DCN 13626

United States District Court

_ DISTRICT OF Massachusetts

W. Mitt Romney, in his official capacity as Governor of the Commonwealth of Massachusetts

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

Donald H. Rumsfeld, in his official capacity as Secretary of
Defense of the United States of America; The Defense Base Closure
and Realignment Comm'n; Anthony J. Principi, as Chairman and
James H. Bilbray, Philip Coyle, Harol W. Gehman, Jr., James V.
Vinson, James T. Hill, Lloyd W. Newton, Samuel K. Skinner, and
Sue E. Turner as members of the Defense Base Closure and
Realignment Comm'n

TO: (Name and Address of Defendant)

The Defense Base Closure and Realignment Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202 05 - 11

05 - 11821 GAO

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Thomas A. Barnico Assistant Attorney General One Ashburton Place Boston, MA 02108

an answer to the complaint which is herewith served upon you, within 0 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SARAHA THORNTON

SEP 0 7 2005

DATE

CLERK

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating vii docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

W. MITT ROMNEY, in his official capacity as Governor of the Commonwealth of Massachusetts,

Plaintiff,

v.

CIVIL ACTION NO. 05-CV-

DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States of America,

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION,

ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission, and

JAMES H. BILBRAY, PHILIP COYLE, HAROLD W. GEHMAN, JR., JAMES V. VINSON, JAMES T. HILL, LLOYD W. NEWTON, SAMUEL K. SKINNER, and SUE E. TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission,

Defendants.

05-11021GAC

COMPLAINT

1. This complaint arises from actions of the Department of Defense and the Defense Base Closure and Realignment Commission ("BRAC Commission") recommending the closure of Otis Air National Guard Base in Barnstable, Massachusetts, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without seeking or

obtaining the approval of the Governor of the Commonwealth of Massachusetts. The plaintiff Governor has declined to consent to such closure and movement of aircraft and seeks (1) a temporary restraining order and a preliminary injunction enjoining the defendants, pending a final decision by this Court on all of plaintiff's claims and until further order of the Court, from transmitting a final report to the President of the United States, due on September 8, 2005, pursuant to the Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act"), that includes the recommendation to close Otis Air National Guard Base, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without the consent of the Governor and (2) a declaration that such a report violates the United States Constitution, Article I, § 8, cl. 16, and 32 U.S.C. § 104, and 10 U.S.C. § 18238.

PARTIES

- 2. Plaintiff W. Mitt Romney (the Governor) is the duly elected Governor of the Commonwealth of Massachusetts (the Commonwealth). The Governor is the "commander-in-chief" of the "military forces" of the Commonwealth and has the power under its constitution "to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws."

 Massachusetts Constitution Pt. 2, c. 2, § 1, art. 7. Governor Romney is the commander-in-chief of the Massachusetts National Guard. Id.
- 3. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense (DoD). He is sued in his official capacity.

The BRAC Act sets forth the process by which military bases in the United States and its territories are identified for closure or realignment. Pursuant to the BRAC Act, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the BRAC Commission. He is authorized to oversee, direct, and implement the closure or realignment of military bases pursuant to the BRAC process.

- 4. Anthony J. Principi is the Chairman of the BRAC Commission. He is sued in his official capacity.
- 5. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

JURISDICTION AND VENUE

- 6. This action arises under the Militia Clause of the United States Constitution, art. 1, § 8, cl. 16, and the following federal statutes: 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States.
- 7. This Court has authority to enter a declaratory judgment in this action under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.
- 8. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2) because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of this action is situated within this judicial district.

FACTUAL ALLEGATIONS

The Recommendations of the Secretary

- 9. On May 13, 2005, Secretary Rumsfeld transmitted to the BRAC Commission the Department of Defense Base Closure and Realignment Report ("BRAC DoD Report").
- 10. The BRAC DoD Report was prepared by the Department pursuant to the BRAC Act.
- 11. The BRAC DoD Report contains the Department's recommendations to realign or close military installations within the United States and its territories.
- 12. While preparing its BRAC DoD Report, the Department considered the requirements of installations used by the Air National Guard of the United States.
- 13. The Secretary recommended closure of Otis Air National Guard Base (Otis ANGB) and the distribution of fifteen F-15 Primary Assigned Aircraft (PAA) of the 102d Fighter Wing to Air Guard Stations in Florida and New Jersey.

The BRAC Commission Report and Action by the President and Congress

14. Pursuant to Section 2914(d)(1) of the BRAC Act, the BRAC must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations," to the President by September 8, 2005. <u>Id.</u> The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations in their entirety. <u>Id.</u> § 2914 (e)(1). If the President disapproves the Commission's

recommendations in their entirety, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. <u>Id.</u> § 2914 (e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. <u>Id.</u> § 2914 (e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. <u>Id.</u> § 2903 (e). If Congress does not enact a resolution disapproving the approved recommendations in their entirety within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. <u>Id.</u> § 2904 (a).

- 15. In each of the four previous BRAC processes—occurring in 1988, 1991, 1993, and 1995—the President approved the BRAC Commission's recommendations in their entirety.
- 16. Congress has never disapproved the President's base closure and realignment decisions.
- 17. On August 26, 2005, the BRAC announced that its report to the President will recommend that (1) Otis ANGB be closed, (2) the 102nd Fighter Wing's fifteen F-15 PAA aircraft be moved to Barnes Air National Guard Base in Westfield, Massachusetts; and (3) the 104th Fighter Wing's fifteen A-10 PAA be moved from Barnes ANGB to other States.

Otis and Barnes ANGB

- 18. Otis ANGB is located in Barnstable, Massachusetts, within the Massachusetts Military Reservation and wholly within the Commonwealth.
- 19. Approximately 1000 military positions are currently allotted to the 102d Fighter Wing at Otis NGB. Approximately 1000 military positions are currently allotted to the 104th Fighter Wing as Barnes ANGB. A substantial number of the members of these wings have

combat and homeland defense experience. The 102nd and 104th Fighter Wings constitute a well-trained, mission-ready state military force available to the Governor to perform state activity duty missions dealing with homeland security, natural disasters and other state missions.

- 20. The closure of Otis ANGB and the movement of the fifteen A-10 PAA of the 104th Fighter Wing at Barnes ANGB and related actions will deprive the Governor of a significant amount of the total strength of the Massachusetts Air National Guard and will reduce the strength of Massachusetts military forces.
- 21. These actions will deprive the Governor and the Commonwealth of a key joint base of operations possessing current and future military capabilities for homeland security missions throughout the Northeast United States.
- 22. The 102nd Fighter Wing at Otis ANGB and the 104th Fighter Wing at Barnes ANGB are organized as units of the Massachusetts Air National Guard (state) and Air Combat Command (federal).
- 23. The recommendations of the BRAC Commission regarding Otis and Barnes, if implemented, would constitute a change in the branch, organization or allotment of the units.
- 24. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the BRAC Commission and the BRAC Commission's recommendations regarding Otis ANGB and Barnes ANGB, more than half of the forces there were not and currently are not in active federal service.
- 25. The recommendations of the BRAC Commission regarding Otis ANGB and Barnes ANGB constitute a relocation or withdrawal of a unit of the Air National Guard.
 - 26. At no time during the 2005 BRAC process has Secretary Rumsfeld requested or

obtained the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts Air National Guard at issue.

- 27. At no time during the 2005 BRAC process has any authorized representative of Secretary Rumsfeld, the Department, or the BRAC Commission requested or obtain the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts ANG at issue.
- 28. On September 1, 2005, Governor Romney sent a letter to Secretary Rumsfeld and Chairman Principi stating that he has not consented to the closure of Otis ANGB or the reassignment of the aircraft of the 102nd or 104th Fighter Wings. A copy of Governor Romney's letter is attached to this complaint as Exhibit A.

RIPENESS FOR JUDICIAL REVIEW

- 29. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his obligation to make recommendations with respect to the 2005 round of realignments and closure of military installations. No further action by the Secretary or the Department is required before Otis ANGB is closed and the fifteen A-10 PAA from Barnes ANGB are ordered moved.
- 30. Pursuant to the military base closure and realignment process set forth in the BRAC Act, the BRAC Commission has finally and completely fulfilled its reporting requirements with respect to the 2005 round of realignments and closure of military installations, save for its duty to transmit its report to the President by September 8, 2005. No further action by the BRAC Commission is required before Otis ANGB is closed and the fifteen A-10 PAA

from Barnes ANGB are moved.

IRREPARABLE HARM

- 31. The Governor's right to withhold consent to action to close, relocate, realign, withdraw, deactivate, or change the branch, organization or allotment of Otis ANGB and the 15 A-10 aircraft at Barnes ANGB has been nullified by the recommendations of the Secretary and the BRAC Commission.
- 32. Neither the President nor Congress may remove Otis and Barnes ANGB from the list of recommended closures and realignments unless they reject the BRAC Commission's recommendations in their entirety. Furthermore, it would be historically unprecedented for the President or Congress to reject an entire slate of closure and realignment recommendations. Moreover, as described above, the closure and realignment recommendations will become law within 45 legislative days after the President approves them. The President must act by September 23, 2005.
- 33. Absent a temporary restraining order, the harm as alleged herein will be irreparable. The recommendations of the Commission would nullify the power of the Governor to withhold his consent, deprive him of a vital homeland security asset, degrade his ability to defend the security of the citizens of the Commonwealth, and deter enlistments and reenlistments in the Massachusetts Air National Guard.

Absent a temporary restraining order, and after action by the President on or before September 23, 2005, judicial review of the report of the Commission may be contested by the United States under <u>Dalton v. Specter</u>, 511 U.S. 462 (1994).

FIRST CLAIM FOR DECLARATORY RELIEF (MILITIA CLAUSE)

- 34. Plaintiff incorporates by reference and re-allege paragraphs 1 through 33, above.
- 35. Article I, § 8, cl. 16, authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."
 - 36. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 37. Pursuant to Article I, § 8, cl. 16, no base, branch, organization or allotment of a National Guard unit not then in federal service and located entirely within a State may be closed or materially changed by the Secretary or the Commission without the consent of the Governor of that State.
- 38. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated the Militia Clause.

SECOND CLAIM FOR DECLARATORY RELIEF (32 U.S.C. § 104)

- 39. Plaintiff incorporates by reference and re-allege paragraphs 1 through 38, above.
- 40. Title 32 U.S.C. § 104(a) provides that "each State . . . may fix the location of the units and headquarters of its National Guard."
- 41. Title 32 U.S.C. § 104(c) provides that "no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."
 - 42. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.

43. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 32 U.S.C. § 104.

THIRD CLAIM FOR DECLARATORY RELIEF (10 U.S.C. § 18238)

- 44. Plaintiff incorporates by reference and re-allege paragraphs 1 through 43.
- 45. Title 10 U.S.C. § 18238 provides: "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State..."
 - 46. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 47. The Commission, in recommending that Otis ANGB be closed and the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 10 U.S.C. § 18238.

PRAYERS FOR RELIEF

WHEREFORE, Governor Romney requests that the Court grant the following relief:

- a. temporarily restrain the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005;
- b. preliminarily enjoin the Commission, Chairman Principi, and the BRAC

- Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005;
- c. permanently enjoin the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005.
- d. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated the Militia Clause of the United States Constitution;
- e. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 32 U.S.C. § 104;
- f. declaring that the Commission, in recommending that Otis ANGB be closed,

fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 10 U.S.C. § 18238;

- g. declaring that the challenged portions of the BRAC DoD report are null and void;
- h. declaring that the portion of the BRAC Report that recommends that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, is null and void;
- enjoining the Secretary from taking any action to close Otis ANG, move the fifteen F-15 aircraft from Otis ANGB to Barnes ANGB, or move the fifteen A-10 aircraft at Barnes ANGB to other States; and
- j. awarding such further relief as the Court deems appropriate.

W. MITT ROMNEY GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS

By his attorneys, THOMAS F. REILLY ATTORNEY GENERAL

David R. Kerrigan, BBO # 550843 Thomas A. Barnico, BBO # 030040 Assistant Attorneys General One Ashburton Place Boston, MA 02108 (617) 727-2200, ext. 2050, 3380

Dated: September 7, 2005



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE DEPARTMENT

STATE HOUSE • BOSTON 02133 (617) 725-4000

MITT ROMNEY

KERRY HEALEY

September 1, 2005

The Honorable Donald H. Rumsfeld Secretary of Defense 1000 Defense Pentagon Washington, DC 20310-1000

The Honorable Anthony J. Principi, Chairman Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

Dear Secretary Rumsfeld and Chairman Principi:

I am writing to state that I have not consented to the following:

- (1) The Department of Defense's recommendation to close Otis Air National Guard (ANG) Base and move the 102nd Fighter Wing's aircraft to bases in other states;
- (2) The BRAC Commission's recommendation to move the 102nd Fighter Wing's 18 F-15 aircraft from Otis ANG Base to Barnes ANG Base and close Otis ANG Base; and
- (3) The BRAC Commission's recommendation to move the 104th Fighter Wing's 15 A-10 aircraft from Barnes ANG base to other states.

Because I have not consented to the closure of Otis ANG Base, the reassignment of the 102nd Fighter Wing's aircraft, or the reassignment of the 104th Fighter Wing's aircraft, these recommendations appear to violate 10 U.S.C. Section 18238 and 32 U.S.C. Section 104(c), which require gubernatorial consent for such actions.

Sincerely

Mitt Romney

Governor



United States Bistrict Court



W. Mitt Romney, in his official capacity as Governor of the Commonwealth of Massachusetts

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

Donald H. Rumsfeld, in his official capacity as Secretary of Defense of the United States of America; The Defense Base Closure and Realignment Comm'n; Anthony J. Principi, as Chairman and James H. Bilbray, Philip Coyle, Harol W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd W. Newton, Samuel K. Skinner, and Sue E. Turner as members of the Defense Base Closure and Realignment Comm'n

TO: (Name and Address of Defendant)

05-11821GAO

James H. Bilbray Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Thomas A. Barnico Assistant Attorney General One Ashburton Place Boston, MA 02108

an answer to the complaint which is herewith served upon you, within ______ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SAPANTA. THOROTON

SFP 07 2005

DATE

CLERK

BY DEPUTY CLERK

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided violating of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating violating the Clerk of Court for the purpose of initiating violating the Clerk of Court for the purpose of initiating violating the Clerk of Court for the purpose of initiating violating the Clerk of Court for the purpose of initiating violating violating

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Thomas A. Barnico, Assi One Ashburton Place, Bo			Attorney Michael Sullivan, Goston, MA 02210	One Courthouse Way,
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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

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AT	TORNEY'S	S NAME _	Thomas A. Barnico, Assistar	nt Attorney General						
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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

W. MITT ROMNEY, in his official capacity as Governor of the Commonwealth of Massachusetts,

Plaintiff,

v.

CIVIL ACTION NO. 05-CV-

015 - 11821 GAC

DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States of America.

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION,

ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission, and

JAMES H. BILBRAY, PHILIP COYLE, HAROLD W. GEHMAN, JR., JAMES V. VINSON, JAMES T. HILL, LLOYD W. NEWTON, SAMUEL K. SKINNER, and SUE E. TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission,

Defendants.

COMPLAINT

1. This complaint arises from actions of the Department of Defense and the Defense Base Closure and Realignment Commission ("BRAC Commission") recommending the closure of Otis Air National Guard Base in Barnstable, Massachusetts, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without seeking or

obtaining the approval of the Governor of the Commonwealth of Massachusetts. The plaintiff Governor has declined to consent to such closure and movement of aircraft and seeks (1) a temporary restraining order and a preliminary injunction enjoining the defendants, pending a final decision by this Court on all of plaintiff's claims and until further order of the Court, from transmitting a final report to the President of the United States, due on September 8, 2005, pursuant to the Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act"), that includes the recommendation to close Otis Air National Guard Base, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without the consent of the Governor and (2) a declaration that such a report violates the United States Constitution, Article I, § 8, cl. 16, and 32 U.S.C. § 104, and 10 U.S.C. § 18238.

PARTIES

- 2. Plaintiff W. Mitt Romney (the Governor) is the duly elected Governor of the Commonwealth of Massachusetts (the Commonwealth). The Governor is the "commander-in-chief" of the "military forces" of the Commonwealth and has the power under its constitution "to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws."

 Massachusetts Constitution Pt. 2, c. 2, § 1, art. 7. Governor Romney is the commander-in-chief of the Massachusetts National Guard. <u>Id.</u>
- 3. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense (DoD). He is sued in his official capacity.

The BRAC Act sets forth the process by which military bases in the United States and its territories are identified for closure or realignment. Pursuant to the BRAC Act, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the BRAC Commission. He is authorized to oversee, direct, and implement the closure or realignment of military bases pursuant to the BRAC process.

- 4. Anthony J. Principi is the Chairman of the BRAC Commission. He is sued in his official capacity.
- 5. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

JURISDICTION AND VENUE

- 6. This action arises under the Militia Clause of the United States Constitution, art. 1, § 8, cl. 16, and the following federal statutes: 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States.
- 7. This Court has authority to enter a declaratory judgment in this action under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.
- 8. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2) because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of this action is situated within this judicial district.

FACTUAL ALLEGATIONS

The Recommendations of the Secretary

- 9. On May 13, 2005, Secretary Rumsfeld transmitted to the BRAC Commission the Department of Defense Base Closure and Realignment Report ("BRAC DoD Report").
- 10. The BRAC DoD Report was prepared by the Department pursuant to the BRAC Act.
- 11. The BRAC DoD Report contains the Department's recommendations to realign or close military installations within the United States and its territories.
- 12. While preparing its BRAC DoD Report, the Department considered the requirements of installations used by the Air National Guard of the United States.
- 13. The Secretary recommended closure of Otis Air National Guard Base (Otis ANGB) and the distribution of fifteen F-15 Primary Assigned Aircraft (PAA) of the 102d Fighter Wing to Air Guard Stations in Florida and New Jersey.

The BRAC Commission Report and Action by the President and Congress

14. Pursuant to Section 2914(d)(1) of the BRAC Act, the BRAC must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations," to the President by September 8, 2005. <u>Id.</u> The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations in their entirety. <u>Id.</u> § 2914 (e)(1). If the President disapproves the Commission's

recommendations in their entirety, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. Id. § 2914 (e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. Id. § 2914 (e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. Id. § 2903 (e). If Congress does not enact a resolution disapproving the approved recommendations in their entirety within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. Id. § 2904 (a).

- 15. In each of the four previous BRAC processes—occurring in 1988, 1991, 1993, and 1995—the President approved the BRAC Commission's recommendations in their entirety.
- 16. Congress has never disapproved the President's base closure and realignment decisions.
- 17. On August 26, 2005, the BRAC announced that its report to the President will recommend that (1) Otis ANGB be closed, (2) the 102nd Fighter Wing's fifteen F-15 PAA aircraft be moved to Barnes Air National Guard Base in Westfield, Massachusetts; and (3) the 104th Fighter Wing's fifteen A-10 PAA be moved from Barnes ANGB to other States.

Otis and Barnes ANGB

- 18. Otis ANGB is located in Barnstable, Massachusetts, within the Massachusetts Military Reservation and wholly within the Commonwealth.
- 19. Approximately 1000 military positions are currently allotted to the 102d Fighter Wing at Otis NGB. Approximately 1000 military positions are currently allotted to the 104th Fighter Wing as Barnes ANGB. A substantial number of the members of these wings have

combat and homeland defense experience. The 102nd and 104th Fighter Wings constitute a well-trained, mission-ready state military force available to the Governor to perform state activity duty missions dealing with homeland security, natural disasters and other state missions.

- 20. The closure of Otis ANGB and the movement of the fifteen A-10 PAA of the 104th Fighter Wing at Barnes ANGB and related actions will deprive the Governor of a significant amount of the total strength of the Massachusetts Air National Guard and will reduce the strength of Massachusetts military forces.
- 21. These actions will deprive the Governor and the Commonwealth of a key joint base of operations possessing current and future military capabilities for homeland security missions throughout the Northeast United States.
- 22. The 102nd Fighter Wing at Otis ANGB and the 104th Fighter Wing at Barnes ANGB are organized as units of the Massachusetts Air National Guard (state) and Air Combat Command (federal).
- 23. The recommendations of the BRAC Commission regarding Otis and Barnes, if implemented, would constitute a change in the branch, organization or allotment of the units.
- 24. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the BRAC Commission and the BRAC Commission's recommendations regarding Otis ANGB and Barnes ANGB, more than half of the forces there were not and currently are not in active federal service.
- 25. The recommendations of the BRAC Commission regarding Otis ANGB and Barnes ANGB constitute a relocation or withdrawal of a unit of the Air National Guard.
 - 26. At no time during the 2005 BRAC process has Secretary Rumsfeld requested or

obtained the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts Air National Guard at issue.

- 27. At no time during the 2005 BRAC process has any authorized representative of Secretary Rumsfeld, the Department, or the BRAC Commission requested or obtain the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts ANG at issue.
- 28. On September 1, 2005, Governor Romney sent a letter to Secretary Rumsfeld and Chairman Principi stating that he has not consented to the closure of Otis ANGB or the reassignment of the aircraft of the 102nd or 104th Fighter Wings. A copy of Governor Romney's letter is attached to this complaint as Exhibit A.

RIPENESS FOR JUDICIAL REVIEW

- 29. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his obligation to make recommendations with respect to the 2005 round of realignments and closure of military installations. No further action by the Secretary or the Department is required before Otis ANGB is closed and the fifteen A-10 PAA from Barnes ANGB are ordered moved.
- 30. Pursuant to the military base closure and realignment process set forth in the BRAC Act, the BRAC Commission has finally and completely fulfilled its reporting requirements with respect to the 2005 round of realignments and closure of military installations, save for its duty to transmit its report to the President by September 8, 2005. No further action by the BRAC Commission is required before Otis ANGB is closed and the fifteen A-10 PAA

from Barnes ANGB are moved.

IRREPARABLE HARM

- 31. The Governor's right to withhold consent to action to close, relocate, realign, withdraw, deactivate, or change the branch, organization or allotment of Otis ANGB and the 15 A-10 aircraft at Barnes ANGB has been nullified by the recommendations of the Secretary and the BRAC Commission.
- 32. Neither the President nor Congress may remove Otis and Barnes ANGB from the list of recommended closures and realignments unless they reject the BRAC Commission's recommendations in their entirety. Furthermore, it would be historically unprecedented for the President or Congress to reject an entire slate of closure and realignment recommendations.

 Moreover, as described above, the closure and realignment recommendations will become law within 45 legislative days after the President approves them. The President must act by September 23, 2005.
- 33. Absent a temporary restraining order, the harm as alleged herein will be irreparable. The recommendations of the Commission would nullify the power of the Governor to withhold his consent, deprive him of a vital homeland security asset, degrade his ability to defend the security of the citizens of the Commonwealth, and deter enlistments and reenlistments in the Massachusetts Air National Guard.

Absent a temporary restraining order, and after action by the President on or before September 23, 2005, judicial review of the report of the Commission may be contested by the United States under <u>Dalton v. Specter</u>, 511 U.S. 462 (1994).

FIRST CLAIM FOR DECLARATORY RELIEF (MILITIA CLAUSE)

- 34. Plaintiff incorporates by reference and re-allege paragraphs 1 through 33, above.
- 35. Article I, § 8, cl. 16, authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."
 - 36. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 37. Pursuant to Article I, § 8, cl. 16, no base, branch, organization or allotment of a National Guard unit not then in federal service and located entirely within a State may be closed or materially changed by the Secretary or the Commission without the consent of the Governor of that State.
- 38. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated the Militia Clause.

SECOND CLAIM FOR DECLARATORY RELIEF (32 U.S.C. § 104)

- 39. Plaintiff incorporates by reference and re-allege paragraphs 1 through 38, above.
- 40. Title 32 U.S.C. § 104(a) provides that "each State . . . may fix the location of the units and headquarters of its National Guard."
- 41. Title 32 U.S.C. § 104(c) provides that "no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."
 - 42. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.

43. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 32 U.S.C. § 104.

THIRD CLAIM FOR DECLARATORY RELIEF (10 U.S.C. § 18238)

- 44. Plaintiff incorporates by reference and re-allege paragraphs 1 through 43.
- 45. Title 10 U.S.C. § 18238 provides: "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State"
 - 46. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 47. The Commission, in recommending that Otis ANGB be closed and the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 10 U.S.C. § 18238.

PRAYERS FOR RELIEF

WHEREFORE, Governor Romney requests that the Court grant the following relief:

- a. temporarily restrain the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005;
- b. preliminarily enjoin the Commission, Chairman Principi, and the BRAC

Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005;

- c. permanently enjoin the Commission, Chairman Principi, and the BRAC Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005.
- d. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated the Militia Clause of the United States Constitution;
- e. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 32 U.S.C. § 104;
- f. declaring that the Commission, in recommending that Otis ANGB be closed,

fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 10 U.S.C. § 18238;

- g. declaring that the challenged portions of the BRAC DoD report are null and void;
- h. declaring that the portion of the BRAC Report that recommends that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, is null and void;
- enjoining the Secretary from taking any action to close Otis ANG, move the fifteen F-15 aircraft from Otis ANGB to Barnes ANGB, or move the fifteen A-10 aircraft at Barnes ANGB to other States; and
- j. awarding such further relief as the Court deems appropriate.

W. MITT ROMNEY
GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS

By his attorneys, THOMAS F. REILLY ATTORNEY GENERAL

David R. Kerrigan BBO # 550843
Thomas A. Barnico, BBO # 030040
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108

(617) 727-2200, ext. 2050, 3380

Dated: September 7, 2005



THE COMMONWEALTH OF MASSACHUSETTS EXECUTIVE DEPARTMENT

STATE HOUSE . BOSTON 02133

(617) 725-4000

MITT ROMNEY
GOVERNOR

KERRY HEALEY

September 1, 2005

The Honorable Donald H. Rumsfeld Secretary of Defense 1000 Defense Pentagon Washington, DC 20310-1000

The Honorable Anthony J. Principi, Chairman Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

Dear Secretary Rumsfeld and Chairman Principi:

I am writing to state that I have not consented to the following:

- (1) The Department of Defense's recommendation to close Otis Air National Guard (ANG) Base and move the 102nd Fighter Wing's aircraft to bases in other states;
- (2) The BRAC Commission's recommendation to move the 102nd Fighter Wing's 18 F-15 aircraft from Otis ANG Base to Barnes ANG Base and close Otis ANG Base; and
- (3) The BRAC Commission's recommendation to move the 104th Fighter Wing's 15 A-10 aircraft from Barnes ANG base to other states.

Because I have not consented to the closure of Otis ANG Base, the reassignment of the 102nd Fighter Wing's aircraft, or the reassignment of the 104th Fighter Wing's aircraft, these recommendations appear to violate 10 U.S.C. Section 18238 and 32 U.S.C. Section 104(c), which require gubernatorial consent for such actions.

Sincerely

Mitt Romney

Governor



United States Bistrict Court

- DISTRICT OF Massachusetts

W. Mitt Romney, in his official capacity as Governor of the Commonwealth of Massachusetts

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

Donald H. Rumsfeld, in his official capacity as Secretary of
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James H. Bilbray, Philip Coyle, Harol W. Gehman, Jr., James V.
Vinson, James T. Hill, Lloyd W. Newton, Samuel K. Skinner, and
Sue E. Turner as members of the Defense Base Closure and
Realignment Comm'n

TO: (Name and Address of Defendant)

05-11821GAO

Philip Coyle
Base Realignment and Closure Commission
Polk Building Suite 600
2521 South Clark Street
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Thomas A. Barnico Assistant Attorney General One Ashburton Place Boston, MA 02108

an answer to the complaint which is herewith served upon you, within ______ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SEP 0 7 2005

DATE

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating in the purpose of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating in the purpose of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating in the purpose of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating in the purpose of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating in the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating in the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating initiating in the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating initiation in the purpose of initiating initiation in the purpose of the United States in September 1974, is required for the use of the Clerk of Court for the United States in September 1974, is required for the use of the Clerk of Court for the United States in September 1974, is required for the use of the Clerk of Court for the United States in September 1974, is required for the use of the Clerk of Court for the United States in September 1974, is required for the United States in September 1974, is required for the United States in September 1974, is required for the United States in September 1974, is required for the United States in September 1974, is required for the United States in September 1974, is required for the United States in September 1974, is required for

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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

W. MITT ROMNEY, in his official capacity as Governor of the Commonwealth of Massachusetts,

Plaintiff,

v.

CIVIL ACTION NO. 05-CV-

0|5-11821GAC

DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States of America,

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION,

ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission, and

JAMES H. BILBRAY, PHILIP COYLE, HAROLD W. GEHMAN, JR., JAMES V. VINSON, JAMES T. HILL, LLOYD W. NEWTON, SAMUEL K. SKINNER, and SUE E. TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission,

Defendants.

COMPLAINT

1. This complaint arises from actions of the Department of Defense and the Defense Base Closure and Realignment Commission ("BRAC Commission") recommending the closure of Otis Air National Guard Base in Barnstable, Massachusetts, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without seeking or

obtaining the approval of the Governor of the Commonwealth of Massachusetts. The plaintiff Governor has declined to consent to such closure and movement of aircraft and seeks (1) a temporary restraining order and a preliminary injunction enjoining the defendants, pending a final decision by this Court on all of plaintiffs claims and until further order of the Court, from transmitting a final report to the President of the United States, due on September 8, 2005, pursuant to the Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act"), that includes the recommendation to close Otis Air National Guard Base, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without the consent of the Governor and (2) a declaration that such a report violates the United States Constitution, Article I, § 8, cl. 16, and 32 U.S.C. § 104, and 10 U.S.C. § 18238.

PARTIES

- 2. Plaintiff W. Mitt Romney (the Governor) is the duly elected Governor of the Commonwealth of Massachusetts (the Commonwealth). The Governor is the "commander-in-chief" of the "military forces" of the Commonwealth and has the power under its constitution "to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws."

 Massachusetts Constitution Pt. 2, c. 2, § 1, art. 7. Governor Romney is the commander-in-chief of the Massachusetts National Guard. Id.
- 3. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense (DoD). He is sued in his official capacity.

The BRAC Act sets forth the process by which military bases in the United States and its territories are identified for closure or realignment. Pursuant to the BRAC Act, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the BRAC Commission. He is authorized to oversee, direct, and implement the closure or realignment of military bases pursuant to the BRAC process.

- 4. Anthony J. Principi is the Chairman of the BRAC Commission. He is sued in his official capacity.
- 5. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

JURISDICTION AND VENUE

- 6. This action arises under the Militia Clause of the United States Constitution, art. 1, § 8, cl. 16, and the following federal statutes: 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States.
- 7. This Court has authority to enter a declaratory judgment in this action under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.
- 8. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2) because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of this action is situated within this judicial district.

FACTUAL ALLEGATIONS

The Recommendations of the Secretary

- 9. On May 13, 2005, Secretary Rumsfeld transmitted to the BRAC Commission the Department of Defense Base Closure and Realignment Report ("BRAC DoD Report").
- 10. The BRAC DoD Report was prepared by the Department pursuant to the BRAC Act.
- 11. The BRAC DoD Report contains the Department's recommendations to realign or close military installations within the United States and its territories.
- 12. While preparing its BRAC DoD Report, the Department considered the requirements of installations used by the Air National Guard of the United States.
- 13. The Secretary recommended closure of Otis Air National Guard Base (Otis ANGB) and the distribution of fifteen F-15 Primary Assigned Aircraft (PAA) of the 102d Fighter Wing to Air Guard Stations in Florida and New Jersey.

The BRAC Commission Report and Action by the President and Congress

14. Pursuant to Section 2914(d)(1) of the BRAC Act, the BRAC must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations," to the President by September 8, 2005. <u>Id.</u> The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations in their entirety. <u>Id.</u> § 2914 (e)(1). If the President disapproves the Commission's

recommendations in their entirety, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. Id. § 2914 (e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. Id. § 2914 (e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. Id. § 2903 (e). If Congress does not enact a resolution disapproving the approved recommendations in their entirety within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. Id. § 2904 (a).

- 15. In each of the four previous BRAC processes—occurring in 1988, 1991, 1993, and 1995—the President approved the BRAC Commission's recommendations in their entirety.
- 16. Congress has never disapproved the President's base closure and realignment decisions.
- 17. On August 26, 2005, the BRAC announced that its report to the President will recommend that (1) Otis ANGB be closed, (2) the 102nd Fighter Wing's fifteen F-15 PAA aircraft be moved to Barnes Air National Guard Base in Westfield, Massachusetts; and (3) the 104th Fighter Wing's fifteen A-10 PAA be moved from Barnes ANGB to other States.

Otis and Barnes ANGB

- 18. Otis ANGB is located in Barnstable, Massachusetts, within the Massachusetts Military Reservation and wholly within the Commonwealth.
- 19. Approximately 1000 military positions are currently allotted to the 102d Fighter Wing at Otis NGB. Approximately 1000 military positions are currently allotted to the 104th Fighter Wing as Barnes ANGB. A substantial number of the members of these wings have

combat and homeland defense experience. The 102nd and 104th Fighter Wings constitute a well-trained, mission-ready state military force available to the Governor to perform state activity duty missions dealing with homeland security, natural disasters and other state missions.

- 20. The closure of Otis ANGB and the movement of the fifteen A-10 PAA of the 104th Fighter Wing at Barnes ANGB and related actions will deprive the Governor of a significant amount of the total strength of the Massachusetts Air National Guard and will reduce the strength of Massachusetts military forces.
- 21. These actions will deprive the Governor and the Commonwealth of a key joint base of operations possessing current and future military capabilities for homeland security missions throughout the Northeast United States.
- 22. The 102nd Fighter Wing at Otis ANGB and the 104th Fighter Wing at Barnes ANGB are organized as units of the Massachusetts Air National Guard (state) and Air Combat Command (federal).
- 23. The recommendations of the BRAC Commission regarding Otis and Barnes, if implemented, would constitute a change in the branch, organization or allotment of the units.
- 24. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the BRAC Commission and the BRAC Commission's recommendations regarding Otis ANGB and Barnes ANGB, more than half of the forces there were not and currently are not in active federal service.
- 25. The recommendations of the BRAC Commission regarding Otis ANGB and Barnes ANGB constitute a relocation or withdrawal of a unit of the Air National Guard.
 - 26. At no time during the 2005 BRAC process has Secretary Rumsfeld requested or

obtained the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts Air National Guard at issue.

- 27. At no time during the 2005 BRAC process has any authorized representative of Secretary Rumsfeld, the Department, or the BRAC Commission requested or obtain the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts ANG at issue.
- 28. On September 1, 2005, Governor Romney sent a letter to Secretary Rumsfeld and Chairman Principi stating that he has not consented to the closure of Otis ANGB or the reassignment of the aircraft of the 102nd or 104th Fighter Wings. A copy of Governor Romney's letter is attached to this complaint as Exhibit A.

RIPENESS FOR JUDICIAL REVIEW

- 29. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his obligation to make recommendations with respect to the 2005 round of realignments and closure of military installations. No further action by the Secretary or the Department is required before Otis ANGB is closed and the fifteen A-10 PAA from Barnes ANGB are ordered moved.
- 30. Pursuant to the military base closure and realignment process set forth in the BRAC Act, the BRAC Commission has finally and completely fulfilled its reporting requirements with respect to the 2005 round of realignments and closure of military installations, save for its duty to transmit its report to the President by September 8, 2005. No further action by the BRAC Commission is required before Otis ANGB is closed and the fifteen A-10 PAA

from Barnes ANGB are moved.

IRREPARABLE HARM

- 31. The Governor's right to withhold consent to action to close, relocate, realign, withdraw, deactivate, or change the branch, organization or allotment of Otis ANGB and the 15 A-10 aircraft at Barnes ANGB has been nullified by the recommendations of the Secretary and the BRAC Commission.
- 32. Neither the President nor Congress may remove Otis and Barnes ANGB from the list of recommended closures and realignments unless they reject the BRAC Commission's recommendations in their entirety. Furthermore, it would be historically unprecedented for the President or Congress to reject an entire slate of closure and realignment recommendations.

 Moreover, as described above, the closure and realignment recommendations will become law within 45 legislative days after the President approves them. The President must act by September 23, 2005.
- 33. Absent a temporary restraining order, the harm as alleged herein will be irreparable. The recommendations of the Commission would nullify the power of the Governor to withhold his consent, deprive him of a vital homeland security asset, degrade his ability to defend the security of the citizens of the Commonwealth, and deter enlistments and reenlistments in the Massachusetts Air National Guard.

Absent a temporary restraining order, and after action by the President on or before September 23, 2005, judicial review of the report of the Commission may be contested by the United States under <u>Dalton v. Specter</u>, 511 U.S. 462 (1994).

FIRST CLAIM FOR DECLARATORY RELIEF (MILITIA CLAUSE)

- 34. Plaintiff incorporates by reference and re-allege paragraphs 1 through 33, above.
- 35. Article I, § 8, cl. 16, authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."
 - 36. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 37. Pursuant to Article I, § 8, cl. 16, no base, branch, organization or allotment of a National Guard unit not then in federal service and located entirely within a State may be closed or materially changed by the Secretary or the Commission without the consent of the Governor of that State.
- 38. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated the Militia Clause.

SECOND CLAIM FOR DECLARATORY RELIEF (32 U.S.C. § 104)

- 39. Plaintiff incorporates by reference and re-allege paragraphs 1 through 38, above.
- 40. Title 32 U.S.C. § 104(a) provides that "each State . . . may fix the location of the units and headquarters of its National Guard."
- 41. Title 32 U.S.C. § 104(c) provides that "no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."
 - 42. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.

43. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 32 U.S.C. § 104.

THIRD CLAIM FOR DECLARATORY RELIEF (10 U.S.C. § 18238)

- 44. Plaintiff incorporates by reference and re-allege paragraphs 1 through 43.
- 45. Title 10 U.S.C. § 18238 provides: "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State...."
 - 46. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 47. The Commission, in recommending that Otis ANGB be closed and the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 10 U.S.C. § 18238.

PRAYERS FOR RELIEF

WHEREFORE, Governor Romney requests that the Court grant the following relief:

- a. temporarily restrain the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005;
- b. preliminarily enjoin the Commission, Chairman Principi, and the BRAC

Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005;

- c. permanently enjoin the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005.
- d. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated the Militia Clause of the United States Constitution;
- e. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 32 U.S.C. § 104;
- f. declaring that the Commission, in recommending that Otis ANGB be closed,

fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 10 U.S.C. § 18238;

- g. declaring that the challenged portions of the BRAC DoD report are null and void;
- h. declaring that the portion of the BRAC Report that recommends that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, is null and void;
- i. enjoining the Secretary from taking any action to close Otis ANG, move the fifteen F-15 aircraft from Otis ANGB to Barnes ANGB, or move the fifteen A-10 aircraft at Barnes ANGB to other States; and
- j. awarding such further relief as the Court deems appropriate.

W. MITT ROMNEY GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS

By his attorneys, THOMAS F. REILLY ATTORNEY GENERAL

David R. Kerrigan BBO # 550843 Thomas A. Barnico, BBO # 030040 Assistant Attorneys General

One Ashburton Place Boston, MA 02108

(617) 727-2200, ext. 2050, 3380

Dated: September 7, 2005



THE COMMONWEALTH OF MASSACHUSETTS EXECUTIVE DEPARTMENT

STATE HOUSE • BOSTON 02133 (617) 725-4000

MITT ROMNEY

KERRY HEALEY

September 1, 2005

The Honorable Donald H. Rumsfeld Secretary of Defense 1000 Defense Pentagon Washington, DC 20310-1000

The Honorable Anthony J. Principi, Chairman Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

Dear Secretary Rumsfeld and Chairman Principi:

I am writing to state that I have not consented to the following:

- (1) The Department of Defense's recommendation to close Otis Air National Guard (ANG) Base and move the 102nd Fighter Wing's aircraft to bases in other states;
- (2) The BRAC Commission's recommendation to move the 102nd Fighter Wing's 18 F-15 aircraft from Otis ANG Base to Barnes ANG Base and close Otis ANG Base; and
- (3) The BRAC Commission's recommendation to move the 104th Fighter Wing's 15 A-10 aircraft from Barnes ANG base to other states.

Because I have not consented to the closure of Otis ANG Base, the reassignment of the 102nd Fighter Wing's aircraft, or the reassignment of the 104th Fighter Wing's aircraft, these recommendations appear to violate 10 U.S.C. Section 18238 and 32 U.S.C. Section 104(c), which require gubernatorial consent for such actions.

Sincercity

Mitt Romney

Governor

United States District Court

DISTRICT OF Massachusetts

W. Mitt Romney, in his official capacity as Governor of the Commonwealth of Massachusetts

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

Donald H. Rumsfeld, in his official capacity as Secretary of
Defense of the United States of America; The Defense Base Closure
and Realignment Comm'n; Anthony J. Principi, as Chairman and
James H. Bilbray, Philip Coyle, Harol W. Gehman, Jr., James V.
Vinson, James T. Hill, Lloyd W. Newton, Samuel K. Skinner, and
Sue E. Turner as members of the Defense Base Closure and
Realignment Comm'n

TO: (Name and Address of Defendant)

Harold W. Gehman, Jr.
Base Realignment and Closure Commission
Polk Building, Suite 600
2521 South Clark Street
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Thomas A. Barnico Assistant Attorney General One Ashburton Place Boston, MA 02108

an answer to the complaint which is herewith served upon you, within <u>60</u> days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SABAH A THORNTON

SEP 07 2005

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided herein local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating yell docket sheet. (SPE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

W. MITT ROMNEY, in his official capacity as Governor of the Commonwealth of Massachusetts,

Plaintiff,

v.

CIVIL ACTION NO. 05-CV-

DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States of America,

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION.

015 - 11821GAC

ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission, and

JAMES H. BILBRAY, PHILIP COYLE, HAROLD W. GEHMAN, JR., JAMES V. VINSON, JAMES T. HILL, LLOYD W. NEWTON, SAMUEL K. SKINNER, and SUE E. TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission,

Defendants.

COMPLAINT

1. This complaint arises from actions of the Department of Defense and the Defense Base Closure and Realignment Commission ("BRAC Commission") recommending the closure of Otis Air National Guard Base in Barnstable, Massachusetts, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without seeking or

obtaining the approval of the Governor of the Commonwealth of Massachusetts. The plaintiff Governor has declined to consent to such closure and movement of aircraft and seeks (1) a temporary restraining order and a preliminary injunction enjoining the defendants, pending a final decision by this Court on all of plaintiff's claims and until further order of the Court, from transmitting a final report to the President of the United States, due on September 8, 2005, pursuant to the Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act"), that includes the recommendation to close Otis Air National Guard Base, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without the consent of the Governor and (2) a declaration that such a report violates the United States Constitution, Article I, § 8, cl. 16, and 32 U.S.C. § 104, and 10 U.S.C. § 18238.

PARTIES

- 2. Plaintiff W. Mitt Romney (the Governor) is the duly elected Governor of the Commonwealth of Massachusetts (the Commonwealth). The Governor is the "commander-in-chief" of the "military forces" of the Commonwealth and has the power under its constitution "to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws."

 Massachusetts Constitution Pt. 2, c. 2, § 1, art. 7. Governor Romney is the commander-in-chief of the Massachusetts National Guard. Id.
- 3. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense (DoD). He is sued in his official capacity.

The BRAC Act sets forth the process by which military bases in the United States and its territories are identified for closure or realignment. Pursuant to the BRAC Act, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the BRAC Commission. He is authorized to oversee, direct, and implement the closure or realignment of military bases pursuant to the BRAC process.

- 4. Anthony J. Principi is the Chairman of the BRAC Commission. He is sued in his official capacity.
- 5. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

JURISDICTION AND VENUE

- 6. This action arises under the Militia Clause of the United States Constitution, art. 1, § 8, cl. 16, and the following federal statutes: 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States.
- 7. This Court has authority to enter a declaratory judgment in this action under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.
- 8. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2) because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of this action is situated within this judicial district.

FACTUAL ALLEGATIONS

The Recommendations of the Secretary

- 9. On May 13, 2005, Secretary Rumsfeld transmitted to the BRAC Commission the Department of Defense Base Closure and Realignment Report ("BRAC DoD Report").
- 10. The BRAC DoD Report was prepared by the Department pursuant to the BRAC Act.
- 11. The BRAC DoD Report contains the Department's recommendations to realign or close military installations within the United States and its territories.
- 12. While preparing its BRAC DoD Report, the Department considered the requirements of installations used by the Air National Guard of the United States.
- 13. The Secretary recommended closure of Otis Air National Guard Base (Otis ANGB) and the distribution of fifteen F-15 Primary Assigned Aircraft (PAA) of the 102d Fighter Wing to Air Guard Stations in Florida and New Jersey.

The BRAC Commission Report and Action by the President and Congress

14. Pursuant to Section 2914(d)(1) of the BRAC Act, the BRAC must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations," to the President by September 8, 2005. <u>Id.</u> The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations in their entirety. <u>Id.</u> § 2914 (e)(1). If the President disapproves the Commission's

recommendations in their entirety, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. Id. § 2914 (e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. Id. § 2914 (e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. Id. § 2903 (e). If Congress does not enact a resolution disapproving the approved recommendations in their entirety within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. Id. § 2904 (a).

- 15. In each of the four previous BRAC processes—occurring in 1988, 1991, 1993, and 1995—the President approved the BRAC Commission's recommendations in their entirety.
- 16. Congress has never disapproved the President's base closure and realignment decisions.
- 17. On August 26, 2005, the BRAC announced that its report to the President will recommend that (1) Otis ANGB be closed, (2) the 102nd Fighter Wing's fifteen F-15 PAA aircraft be moved to Barnes Air National Guard Base in Westfield, Massachusetts; and (3) the 104th Fighter Wing's fifteen A-10 PAA be moved from Barnes ANGB to other States.

Otis and Barnes ANGB

- 18. Otis ANGB is located in Barnstable, Massachusetts, within the Massachusetts
 Military Reservation and wholly within the Commonwealth.
- 19. Approximately 1000 military positions are currently allotted to the 102d Fighter Wing at Otis NGB. Approximately 1000 military positions are currently allotted to the 104th Fighter Wing as Barnes ANGB. A substantial number of the members of these wings have

combat and homeland defense experience. The 102nd and 104th Fighter Wings constitute a well-trained, mission-ready state military force available to the Governor to perform state activity duty missions dealing with homeland security, natural disasters and other state missions.

- 20. The closure of Otis ANGB and the movement of the fifteen A-10 PAA of the 104th Fighter Wing at Barnes ANGB and related actions will deprive the Governor of a significant amount of the total strength of the Massachusetts Air National Guard and will reduce the strength of Massachusetts military forces.
- 21. These actions will deprive the Governor and the Commonwealth of a key joint base of operations possessing current and future military capabilities for homeland security missions throughout the Northeast United States.
- 22. The 102nd Fighter Wing at Otis ANGB and the 104th Fighter Wing at Barnes ANGB are organized as units of the Massachusetts Air National Guard (state) and Air Combat Command (federal).
- 23. The recommendations of the BRAC Commission regarding Otis and Barnes, if implemented, would constitute a change in the branch, organization or allotment of the units.
- 24. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the BRAC Commission and the BRAC Commission's recommendations regarding Otis ANGB and Barnes ANGB, more than half of the forces there were not and currently are not in active federal service.
- 25. The recommendations of the BRAC Commission regarding Otis ANGB and Barnes ANGB constitute a relocation or withdrawal of a unit of the Air National Guard.
 - 26. At no time during the 2005 BRAC process has Secretary Rumsfeld requested or

obtained the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts Air National Guard at issue.

- 27. At no time during the 2005 BRAC process has any authorized representative of Secretary Rumsfeld, the Department, or the BRAC Commission requested or obtain the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts ANG at issue.
- 28. On September 1, 2005, Governor Romney sent a letter to Secretary Rumsfeld and Chairman Principi stating that he has not consented to the closure of Otis ANGB or the reassignment of the aircraft of the 102nd or 104th Fighter Wings. A copy of Governor Romney's letter is attached to this complaint as Exhibit A.

RIPENESS FOR JUDICIAL REVIEW

- 29. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his obligation to make recommendations with respect to the 2005 round of realignments and closure of military installations. No further action by the Secretary or the Department is required before Otis ANGB is closed and the fifteen A-10 PAA from Barnes ANGB are ordered moved.
- 30. Pursuant to the military base closure and realignment process set forth in the BRAC Act, the BRAC Commission has finally and completely fulfilled its reporting requirements with respect to the 2005 round of realignments and closure of military installations, save for its duty to transmit its report to the President by September 8, 2005. No further action by the BRAC Commission is required before Otis ANGB is closed and the fifteen A-10 PAA

from Barnes ANGB are moved.

IRREPARABLE HARM

- 31. The Governor's right to withhold consent to action to close, relocate, realign, withdraw, deactivate, or change the branch, organization or allotment of Otis ANGB and the 15 A-10 aircraft at Barnes ANGB has been nullified by the recommendations of the Secretary and the BRAC Commission.
- 32. Neither the President nor Congress may remove Otis and Barnes ANGB from the list of recommended closures and realignments unless they reject the BRAC Commission's recommendations in their entirety. Furthermore, it would be historically unprecedented for the President or Congress to reject an entire slate of closure and realignment recommendations.

 Moreover, as described above, the closure and realignment recommendations will become law within 45 legislative days after the President approves them. The President must act by September 23, 2005.
- 33. Absent a temporary restraining order, the harm as alleged herein will be irreparable. The recommendations of the Commission would nullify the power of the Governor to withhold his consent, deprive him of a vital homeland security asset, degrade his ability to defend the security of the citizens of the Commonwealth, and deter enlistments and reenlistments in the Massachusetts Air National Guard.

Absent a temporary restraining order, and after action by the President on or before September 23, 2005, judicial review of the report of the Commission may be contested by the United States under <u>Dalton v. Specter</u>, 511 U.S. 462 (1994).

FIRST CLAIM FOR DECLARATORY RELIEF (MILITIA CLAUSE)

- 34. Plaintiff incorporates by reference and re-allege paragraphs 1 through 33, above.
- 35. Article I, § 8, cl. 16, authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."
 - 36. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 37. Pursuant to Article I, § 8, cl. 16, no base, branch, organization or allotment of a National Guard unit not then in federal service and located entirely within a State may be closed or materially changed by the Secretary or the Commission without the consent of the Governor of that State.
- 38. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated the Militia Clause.

SECOND CLAIM FOR DECLARATORY RELIEF (32 U.S.C. § 104)

- 39. Plaintiff incorporates by reference and re-allege paragraphs 1 through 38, above.
- 40. Title 32 U.S.C. § 104(a) provides that "each State . . . may fix the location of the units and headquarters of its National Guard."
- 41. Title 32 U.S.C. § 104(c) provides that "no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."
 - 42. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.

43. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 32 U.S.C. § 104.

THIRD CLAIM FOR DECLARATORY RELIEF (10 U.S.C. § 18238)

- 44. Plaintiff incorporates by reference and re-allege paragraphs 1 through 43.
- 45. Title 10 U.S.C. § 18238 provides: "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State...."
 - 46. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 47. The Commission, in recommending that Otis ANGB be closed and the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 10 U.S.C. § 18238.

PRAYERS FOR RELIEF

WHEREFORE, Governor Romney requests that the Court grant the following relief:

- a. temporarily restrain the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005;
- b. preliminarily enjoin the Commission, Chairman Principi, and the BRAC

- Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005;
- c. permanently enjoin the Commission, Chairman Principi, and the BRAC Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005.
- d. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated the Militia Clause of the United States Constitution;
- e. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 32 U.S.C. § 104;
- f. declaring that the Commission, in recommending that Otis ANGB be closed,

fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 10 U.S.C. § 18238;

- g. declaring that the challenged portions of the BRAC DoD report are null and void;
- h. declaring that the portion of the BRAC Report that recommends that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, is null and void;
- i. enjoining the Secretary from taking any action to close Otis ANG, move the fifteen F-15 aircraft from Otis ANGB to Barnes ANGB, or move the fifteen A-10 aircraft at Barnes ANGB to other States; and
- j. awarding such further relief as the Court deems appropriate.

W. MITT ROMNEY GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS

By his attorneys, THOMAS F. REILLY ATTORNEY GENERAL

David R. Kerrigan BBO # 550843 Thomas A. Barnico, BBO # 030040 Assistant Attorneys General One Ashburton Place Boston, MA 02108

(617) 727-2200, ext. 2050, 3380

Dated: September 7, 2005



THE COMMONWEALTH OF MASSACHUSETTS EXECUTIVE DEPARTMENT

STATE HOUSE . BOSTON 02133

(617) 725-4000

MITT ROMNEY
GOVERNOR

KERRY HEALEY LIEUTENANT GOVERNOR September 1, 2005

The Honorable Donald H. Rumsfeld Secretary of Defense 1000 Defense Pentagon Washington, DC 20310-1000

The Honorable Anthony J. Principi, Chairman Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

Dear Secretary Rumsfeld and Chairman Principi:

I am writing to state that I have not consented to the following:

- (1) The Department of Defense's recommendation to close Otis Air National Guard (ANG) Base and move the 102nd Fighter Wing's aircraft to bases in other states;
- (2) The BRAC Commission's recommendation to move the 102nd Fighter Wing's 18 F-15 aircraft from Otis ANG Base to Barnes ANG Base and close Otis ANG Base; and
- (3) The BRAC Commission's recommendation to move the 104th Fighter Wing's 15 A-10 aircraft from Barnes ANG base to other states.

Because I have not consented to the closure of Otis ANG Base, the reassignment of the 102nd Fighter Wing's aircraft, or the reassignment of the 104th Fighter Wing's aircraft, these recommendations appear to violate 10 U.S.C. Section 18238 and 32 U.S.C. Section 104(c), which require gubernatorial consent for such actions.

Sincerely

Mitt Romney

Governor



United States Bistrict Court

DISTRICT OF Massachusetts

W. Mitt Romney, in his official capacity as Governor of the Commonwealth of Massachusetts

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

Donald H. Rumsfeld, in his official capacity as Secretary of Defense of the United States of America; The Defense Base Closure and Realignment Comm'n; Anthony J. Principi, as Chairman and James H. Bilbray, Philip Coyle, Harol W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd W. Newton, Samuel K. Skinner, and Sue E. Turner as members of the Defense Base Closure and Realignment Comm'n

TO: (Name and Address of Defendant)

James V. Vinson
Base Realignment and Closure Commission
Polk Building, Suite 600
2521 South Clark Street
Arlington, VA 22202

05-11821 GAO

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Thomas A. Barnico Assistant Attorney General One Ashburton Place Boston, MA 02108

an answer to the complaint which is herewith served upon you, within (ρD) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SABAHIA. THOPNED N

SEP 07 2005

DATE

CLERK

BY DEPUTY CLERK

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the purpose of initiating local rules of the Clerk of Court for the Purpose of Initiating local rules of the Clerk of Court for the Clerk o

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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

W. MITT ROMNEY, in his official capacity as Governor of the Commonwealth of Massachusetts,

Plaintiff,

V.

CIVIL ACTION NO. 05-CV-

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DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States of America,

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION,

ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission, and

JAMES H. BILBRAY, PHILIP COYLE, HAROLD W. GEHMAN, JR., JAMES V. VINSON, JAMES T. HILL, LLOYD W. NEWTON, SAMUEL K. SKINNER, and SUE E. TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission,

Defendants.

COMPLAINT

1. This complaint arises from actions of the Department of Defense and the Defense Base Closure and Realignment Commission ("BRAC Commission") recommending the closure of Otis Air National Guard Base in Barnstable, Massachusetts, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without seeking or

obtaining the approval of the Governor of the Commonwealth of Massachusetts. The plaintiff Governor has declined to consent to such closure and movement of aircraft and seeks (1) a temporary restraining order and a preliminary injunction enjoining the defendants, pending a final decision by this Court on all of plaintiff's claims and until further order of the Court, from transmitting a final report to the President of the United States, due on September 8, 2005, pursuant to the Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act"), that includes the recommendation to close Otis Air National Guard Base, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without the consent of the Governor and (2) a declaration that such a report violates the United States Constitution, Article 1, § 8, cl. 16, and 32 U.S.C. § 104, and 10 U.S.C. § 18238.

PARTIES

- 2. Plaintiff W. Mitt Romney (the Governor) is the duly elected Governor of the Commonwealth of Massachusetts (the Commonwealth). The Governor is the "commander-in-chief" of the "military forces" of the Commonwealth and has the power under its constitution "to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws."

 Massachusetts Constitution Pt. 2, c. 2, § 1, art. 7. Governor Romney is the commander-in-chief of the Massachusetts National Guard. <u>Id.</u>
- 3. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense (DoD). He is sued in his official capacity.

The BRAC Act sets forth the process by which military bases in the United States and its territories are identified for closure or realignment. Pursuant to the BRAC Act, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the BRAC Commission. He is authorized to oversee, direct, and implement the closure or realignment of military bases pursuant to the BRAC process.

- 4. Anthony J. Principi is the Chairman of the BRAC Commission. He is sued in his official capacity.
- 5. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

JURISDICTION AND VENUE

- 6. This action arises under the Militia Clause of the United States Constitution, art. 1, § 8, cl. 16, and the following federal statutes: 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States.
- 7. This Court has authority to enter a declaratory judgment in this action under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.
- 8. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2) because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of this action is situated within this judicial district.

FACTUAL ALLEGATIONS

The Recommendations of the Secretary

- 9. On May 13, 2005, Secretary Rumsfeld transmitted to the BRAC Commission the Department of Defense Base Closure and Realignment Report ("BRAC DoD Report").
- 10. The BRAC DoD Report was prepared by the Department pursuant to the BRAC Act.
- 11. The BRAC DoD Report contains the Department's recommendations to realign or close military installations within the United States and its territories.
- 12. While preparing its BRAC DoD Report, the Department considered the requirements of installations used by the Air National Guard of the United States.
- 13. The Secretary recommended closure of Otis Air National Guard Base (Otis ANGB) and the distribution of fifteen F-15 Primary Assigned Aircraft (PAA) of the 102d Fighter Wing to Air Guard Stations in Florida and New Jersey.

The BRAC Commission Report and Action by the President and Congress

14. Pursuant to Section 2914(d)(1) of the BRAC Act, the BRAC must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations," to the President by September 8, 2005. <u>Id.</u> The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations in their entirety. <u>Id.</u> § 2914 (e)(1). If the President disapproves the Commission's

recommendations in their entirety, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. Id. § 2914 (e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. Id. § 2914 (e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. Id. § 2903 (e). If Congress does not enact a resolution disapproving the approved recommendations in their entirety within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. Id. § 2904 (a).

- 15. In each of the four previous BRAC processes—occurring in 1988, 1991, 1993, and 1995—the President approved the BRAC Commission's recommendations in their entirety.
- 16. Congress has never disapproved the President's base closure and realignment decisions.
- 17. On August 26, 2005, the BRAC announced that its report to the President will recommend that (1) Otis ANGB be closed, (2) the 102nd Fighter Wing's fifteen F-15 PAA aircraft be moved to Barnes Air National Guard Base in Westfield, Massachusetts; and (3) the 104th Fighter Wing's fifteen A-10 PAA be moved from Barnes ANGB to other States.

Otis and Barnes ANGB

- 18. Otis ANGB is located in Barnstable, Massachusetts, within the Massachusetts Military Reservation and wholly within the Commonwealth.
- 19. Approximately 1000 military positions are currently allotted to the 102d Fighter Wing at Otis NGB. Approximately 1000 military positions are currently allotted to the 104th Fighter Wing as Barnes ANGB. A substantial number of the members of these wings have

combat and homeland defense experience. The 102nd and 104th Fighter Wings constitute a well-trained, mission-ready state military force available to the Governor to perform state activity duty missions dealing with homeland security, natural disasters and other state missions.

- 20. The closure of Otis ANGB and the movement of the fifteen A-10 PAA of the 104th Fighter Wing at Barnes ANGB and related actions will deprive the Governor of a significant amount of the total strength of the Massachusetts Air National Guard and will reduce the strength of Massachusetts military forces.
- 21. These actions will deprive the Governor and the Commonwealth of a key joint base of operations possessing current and future military capabilities for homeland security missions throughout the Northeast United States.
- 22. The 102nd Fighter Wing at Otis ANGB and the 104th Fighter Wing at Barnes ANGB are organized as units of the Massachusetts Air National Guard (state) and Air Combat Command (federal).
- 23. The recommendations of the BRAC Commission regarding Otis and Barnes, if implemented, would constitute a change in the branch, organization or allotment of the units.
- 24. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the BRAC Commission and the BRAC Commission's recommendations regarding Otis ANGB and Barnes ANGB, more than half of the forces there were not and currently are not in active federal service.
- 25. The recommendations of the BRAC Commission regarding Otis ANGB and Barnes ANGB constitute a relocation or withdrawal of a unit of the Air National Guard.
 - 26. At no time during the 2005 BRAC process has Secretary Rumsfeld requested or

obtained the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts Air National Guard at issue.

- 27. At no time during the 2005 BRAC process has any authorized representative of Secretary Rumsfeld, the Department, or the BRAC Commission requested or obtain the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts ANG at issue.
- 28. On September 1, 2005, Governor Romney sent a letter to Secretary Rumsfeld and Chairman Principi stating that he has not consented to the closure of Otis ANGB or the reassignment of the aircraft of the 102nd or 104th Fighter Wings. A copy of Governor Romney's letter is attached to this complaint as Exhibit A.

RIPENESS FOR JUDICIAL REVIEW

- 29. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his obligation to make recommendations with respect to the 2005 round of realignments and closure of military installations. No further action by the Secretary or the Department is required before Otis ANGB is closed and the fifteen A-10 PAA from Barnes ANGB are ordered moved.
- 30. Pursuant to the military base closure and realignment process set forth in the BRAC Act, the BRAC Commission has finally and completely fulfilled its reporting requirements with respect to the 2005 round of realignments and closure of military installations, save for its duty to transmit its report to the President by September 8, 2005. No further action by the BRAC Commission is required before Otis ANGB is closed and the fifteen A-10 PAA

from Barnes ANGB are moved.

IRREPARABLE HARM

- 31. The Governor's right to withhold consent to action to close, relocate, realign, withdraw, deactivate, or change the branch, organization or allotment of Otis ANGB and the 15 A-10 aircraft at Barnes ANGB has been nullified by the recommendations of the Secretary and the BRAC Commission.
- 32. Neither the President nor Congress may remove Otis and Barnes ANGB from the list of recommended closures and realignments unless they reject the BRAC Commission's recommendations in their entirety. Furthermore, it would be historically unprecedented for the President or Congress to reject an entire slate of closure and realignment recommendations.

 Moreover, as described above, the closure and realignment recommendations will become law within 45 legislative days after the President approves them. The President must act by September 23, 2005.
- 33. Absent a temporary restraining order, the harm as alleged herein will be irreparable. The recommendations of the Commission would nullify the power of the Governor to withhold his consent, deprive him of a vital homeland security asset, degrade his ability to defend the security of the citizens of the Commonwealth, and deter enlistments and reenlistments in the Massachusetts Air National Guard.

Absent a temporary restraining order, and after action by the President on or before September 23, 2005, judicial review of the report of the Commission may be contested by the United States under <u>Dalton v. Specter</u>, 511 U.S. 462 (1994).

FIRST CLAIM FOR DECLARATORY RELIEF (MILITIA CLAUSE)

- 34. Plaintiff incorporates by reference and re-allege paragraphs 1 through 33, above.
- 35. Article I, § 8, cl. 16, authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."
 - 36. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 37. Pursuant to Article I, § 8, cl. 16, no base, branch, organization or allotment of a National Guard unit not then in federal service and located entirely within a State may be closed or materially changed by the Secretary or the Commission without the consent of the Governor of that State.
- 38. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated the Militia Clause.

SECOND CLAIM FOR DECLARATORY RELIEF (32 U.S.C. § 104)

- 39. Plaintiff incorporates by reference and re-allege paragraphs 1 through 38, above.
- 40. Title 32 U.S.C. § 104(a) provides that "each State . . . may fix the location of the units and headquarters of its National Guard."
- 41. Title 32 U.S.C. § 104(c) provides that "no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."
 - 42. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.

43. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 32 U.S.C. § 104.

THIRD CLAIM FOR DECLARATORY RELIEF (10 U.S.C. § 18238)

- 44. Plaintiff incorporates by reference and re-allege paragraphs 1 through 43.
- 45. Title 10 U.S.C. § 18238 provides: "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State...."
 - 46. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 47. The Commission, in recommending that Otis ANGB be closed and the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 10 U.S.C. § 18238.

PRAYERS FOR RELIEF

WHEREFORE, Governor Romney requests that the Court grant the following relief:

- a. temporarily restrain the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005;
- b. preliminarily enjoin the Commission, Chairman Principi, and the BRAC

- Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005;
- c. permanently enjoin the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005.
- d. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated the Militia Clause of the United States Constitution;
- e. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 32 U.S.C. § 104;
- f. declaring that the Commission, in recommending that Otis ANGB be closed,

fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 10 U.S.C. § 18238;

- g. declaring that the challenged portions of the BRAC DoD report are null and void;
- h. declaring that the portion of the BRAC Report that recommends that Otis ANGB
 be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and
 fifteen A-10 aircraft at Barnes ANGB be moved to other States, is null and void;
- i. enjoining the Secretary from taking any action to close Otis ANG, move the fifteen F-15 aircraft from Otis ANGB to Barnes ANGB, or move the fifteen A-10 aircraft at Barnes ANGB to other States; and
- j. awarding such further relief as the Court deems appropriate.

W. MITT ROMNEY GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS

By his attorneys, THOMAS F. REILLY ATTORNEY GENERAL

David R. Kerrigan BBO # 550843
Thomas A. Barnico, BBO # 030040
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108

(617) 727-2200, ext. 2050, 3380

Dated: September 7, 2005

THE COMMONWEALTH OF MASSACHUSETTS EXECUTIVE DEPARTMENT

STATE HOUSE . BOSTON 02133

(617) 725-4000

MITT ROMNEY
GOVERNOR

KERRY HEALEY

September 1, 2005

The Honorable Donald H. Rumsfeld Secretary of Defense 1000 Defense Pentagon Washington, DC 20310-1000

The Honorable Anthony J. Principi, Chairman Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

Dear Secretary Rumsfeld and Chairman Principi:

I am writing to state that I have not consented to the following:

- (1) The Department of Defense's recommendation to close Otis Air National Guard (ANG) Base and move the 102nd Fighter Wing's aircraft to bases in other states;
- (2) The BRAC Commission's recommendation to move the 102nd Fighter Wing's 18 F-15 aircraft from Otis ANG Base to Barnes ANG Base and close Otis ANG Base; and
- (3) The BRAC Commission's recommendation to move the 104th Fighter Wing's 15 A-10 aircraft from Barnes ANG base to other states.

Because I have not consented to the closure of Otis ANG Base, the reassignment of the 102nd Fighter Wing's aircraft, or the reassignment of the 104th Fighter Wing's aircraft, these recommendations appear to violate 10 U.S.C. Section 18238 and 32 U.S.C. Section 104(c), which require gubernatorial consent for such actions.

Sincerely

Mitt Romney

Governor

United States Bistrict Court

DISTRICT OF Massachusetts

W. Mitt Romney, in his official capacity as Governor of the Commonwealth of Massachusetts

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

Donald H. Rumsfeld, in his official capacity as Secretary of Defense of the United States of America; The Defense Base Closure and Realignment Comm'n; Anthony J. Principi, as Chairman and James H. Bilbray, Philip Coyle, Harol W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd W. Newton, Samuel K. Skinner, and Sue E. Turner as members of the Defense Base Closure and Realignment Comm'n

TO: (Name and Address of Defendant)

05 - 11821 GAO

James T. Hill
Base Realignment and Closure Commission
Polk Building, Suite 600
2521 South Clark Street
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Thomas A. Barnico Assistant Attorney General One Ashburton Place Boston, MA 02108

an answer to the complaint which is herewith served upon you, within ______ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SARAHA THORNTON

SEP 0 7 2005

DATE

CLERK

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating vil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

V. Mitt Romney, in his commonwealth of Mass				
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(c) Attorney's (Firm Name	e, Address, and Telephone Number)	Attorneys (If Knowa)		
homas A. Barnico, Ass one Ashburton Place, Bo		Suite 9200, Bosto		
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J 120 Marine J 130 Miller Act J 140 Negotiable Instrument	☐ 310 Airplane ☐ 362 Personal Injury - ☐ 315 Airplane Product Med. Malpractice Liability ☐ 365 Personal Injury -	☐ 620 Other Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC 881	28 USC 157	U 410 Antitrust U 430 Banks and Banking U 450 Commerce
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190 Other Contract 195 Contract Product Liability	Product Liability 385 Property Damage 360 Other Personal Product Liability	☐ 720 Labor/Mgmt, Relations ☐ 730 Labor/Mgmt, Reporting	☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI	I2 USC 3410 890 Other Statutory Actions
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220 Foreclosure	441 Voting Sentence	790 Other Labor Litigation 791 Empl. Ret. Inc.	 870 Taxes (U.S. Plaintiff or Defendant) 	893 Environmental Matters 894 Energy Allocation Act
230 Rent Lease & Ejectment	443 Housing/ Habeas Corpus:	Security Act	(7) 871 IRS—Third Party	895 Freedom of Information
240 Torts to Land 245 Tort Product Liability	Accommodations 530 General 555 Death Penalty		26 USC 7609	Act 900Appeal of Fee Determination
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I. CAUSE OF ACTION	Brief description of cause: Defendants action	ons in recommending closus enor violates U.S. Const. ar	re of Otis Air National Gus t. 1, § 8, cl. 16, 32 U.S.C.	ard Base without obtaining § 104 and 10 U.S.C. § 18238
II. REQUESTED IN	☐ CHECK IF THIS IS A CLASS ACTION	DEMAND \$	CHECK YES only	if demanded in complaint:
COMPLAINT:	UNDER F.R.C.P. 23		JURY DEMAND:	☐ Yes © No
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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

1.	Title of	case (nar	me of first party on e	ach side only)_	W. Mitt Romney	. Donak	d H. Rumstel	<u>a</u>	
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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

W. MITT ROMNEY, in his official capacity as Governor of the Commonwealth of Massachusetts,

Plaintiff,

v.

CIVIL ACTION NO. 05-CV-

5-11821GAC

DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States of America,

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION,

ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission, and

JAMES H. BILBRAY, PHILIP COYLE, HAROLD W. GEHMAN, JR., JAMES V. VINSON, JAMES T. HILL, LLOYD W. NEWTON, SAMUEL K. SKINNER, and SUE E. TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission,

Defendants.

COMPLAINT

1. This complaint arises from actions of the Department of Defense and the Defense Base Closure and Realignment Commission ("BRAC Commission") recommending the closure of Otis Air National Guard Base in Barnstable, Massachusetts, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without seeking or

obtaining the approval of the Governor of the Commonwealth of Massachusetts. The plaintiff Governor has declined to consent to such closure and movement of aircraft and seeks (1) a temporary restraining order and a preliminary injunction enjoining the defendants, pending a final decision by this Court on all of plaintiff's claims and until further order of the Court, from transmitting a final report to the President of the United States, due on September 8, 2005, pursuant to the Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act"), that includes the recommendation to close Otis Air National Guard Base, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without the consent of the Governor and (2) a declaration that such a report violates the United States Constitution, Article I, § 8, cl. 16, and 32 U.S.C. § 104, and 10 U.S.C. § 18238.

PARTIES

- 2. Plaintiff W. Mitt Romney (the Governor) is the duly elected Governor of the Commonwealth of Massachusetts (the Commonwealth). The Governor is the "commander-in-chief" of the "military forces" of the Commonwealth and has the power under its constitution "to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws."

 Massachusetts Constitution Pt. 2, c. 2, § 1, art. 7. Governor Romney is the commander-in-chief of the Massachusetts National Guard. <u>Id.</u>
- 3. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense (DoD). He is sued in his official capacity.

The BRAC Act sets forth the process by which military bases in the United States and its territories are identified for closure or realignment. Pursuant to the BRAC Act, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the BRAC Commission. He is authorized to oversee, direct, and implement the closure or realignment of military bases pursuant to the BRAC process.

- 4. Anthony J. Principi is the Chairman of the BRAC Commission. He is sued in his official capacity.
- 5. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

JURISDICTION AND VENUE

- 6. This action arises under the Militia Clause of the United States Constitution, art. 1, § 8, cl. 16, and the following federal statutes: 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States.
- 7. This Court has authority to enter a declaratory judgment in this action under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.
- 8. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2) because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of this action is situated within this judicial district.

FACTUAL ALLEGATIONS

The Recommendations of the Secretary

- 9. On May 13, 2005, Secretary Rumsfeld transmitted to the BRAC Commission the Department of Defense Base Closure and Realignment Report ("BRAC DoD Report").
- 10. The BRAC DoD Report was prepared by the Department pursuant to the BRAC Act.
- 11. The BRAC DoD Report contains the Department's recommendations to realign or close military installations within the United States and its territories.
- 12. While preparing its BRAC DoD Report, the Department considered the requirements of installations used by the Air National Guard of the United States.
- 13. The Secretary recommended closure of Otis Air National Guard Base (Otis ANGB) and the distribution of fifteen F-15 Primary Assigned Aircraft (PAA) of the 102d Fighter Wing to Air Guard Stations in Florida and New Jersey.

The BRAC Commission Report and Action by the President and Congress

14. Pursuant to Section 2914(d)(1) of the BRAC Act, the BRAC must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations," to the President by September 8, 2005. <u>Id.</u> The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations in their entirety. <u>Id.</u> § 2914 (e)(1). If the President disapproves the Commission's

recommendations in their entirety, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. Id. § 2914 (e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. Id. § 2914 (e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. Id. § 2903 (e). If Congress does not enact a resolution disapproving the approved recommendations in their entirety within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. Id. § 2904 (a).

- 15. In each of the four previous BRAC processes—occurring in 1988, 1991, 1993, and 1995—the President approved the BRAC Commission's recommendations in their entirety.
- 16. Congress has never disapproved the President's base closure and realignment decisions.
- 17. On August 26, 2005, the BRAC announced that its report to the President will recommend that (1) Otis ANGB be closed, (2) the 102nd Fighter Wing's fifteen F-15 PAA aircraft be moved to Barnes Air National Guard Base in Westfield, Massachusetts; and (3) the 104th Fighter Wing's fifteen A-10 PAA be moved from Barnes ANGB to other States.

Otis and Barnes ANGB

- 18. Otis ANGB is located in Barnstable, Massachusetts, within the Massachusetts Military Reservation and wholly within the Commonwealth.
- 19. Approximately 1000 military positions are currently allotted to the 102d Fighter Wing at Otis NGB. Approximately 1000 military positions are currently allotted to the 104th Fighter Wing as Barnes ANGB. A substantial number of the members of these wings have

combat and homeland defense experience. The 102nd and 104th Fighter Wings constitute a well-trained, mission-ready state military force available to the Governor to perform state activity duty missions dealing with homeland security, natural disasters and other state missions.

- 20. The closure of Otis ANGB and the movement of the fifteen A-10 PAA of the 104th Fighter Wing at Barnes ANGB and related actions will deprive the Governor of a significant amount of the total strength of the Massachusetts Air National Guard and will reduce the strength of Massachusetts military forces.
- 21. These actions will deprive the Governor and the Commonwealth of a key joint base of operations possessing current and future military capabilities for homeland security missions throughout the Northeast United States.
- 22. The 102nd Fighter Wing at Otis ANGB and the 104th Fighter Wing at Barnes ANGB are organized as units of the Massachusetts Air National Guard (state) and Air Combat Command (federal).
- 23. The recommendations of the BRAC Commission regarding Otis and Barnes, if implemented, would constitute a change in the branch, organization or allotment of the units.
- 24. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the BRAC Commission and the BRAC Commission's recommendations regarding Otis ANGB and Barnes ANGB, more than half of the forces there were not and currently are not in active federal service.
- 25. The recommendations of the BRAC Commission regarding Otis ANGB and Barnes ANGB constitute a relocation or withdrawal of a unit of the Air National Guard.
 - 26. At no time during the 2005 BRAC process has Secretary Rumsfeld requested or

obtained the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts Air National Guard at issue.

- 27. At no time during the 2005 BRAC process has any authorized representative of Secretary Rumsfeld, the Department, or the BRAC Commission requested or obtain the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts ANG at issue.
- 28. On September 1, 2005, Governor Romney sent a letter to Secretary Rumsfeld and Chairman Principi stating that he has not consented to the closure of Otis ANGB or the reassignment of the aircraft of the 102nd or 104th Fighter Wings. A copy of Governor Romney's letter is attached to this complaint as Exhibit A.

RIPENESS FOR JUDICIAL REVIEW

- 29. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his obligation to make recommendations with respect to the 2005 round of realignments and closure of military installations. No further action by the Secretary or the Department is required before Otis ANGB is closed and the fifteen A-10 PAA from Barnes ANGB are ordered moved.
- 30. Pursuant to the military base closure and realignment process set forth in the BRAC Act, the BRAC Commission has finally and completely fulfilled its reporting requirements with respect to the 2005 round of realignments and closure of military installations, save for its duty to transmit its report to the President by September 8, 2005. No further action by the BRAC Commission is required before Otis ANGB is closed and the fifteen A-10 PAA

from Barnes ANGB are moved.

IRREPARABLE HARM

- 31. The Governor's right to withhold consent to action to close, relocate, realign, withdraw, deactivate, or change the branch, organization or allotment of Otis ANGB and the 15 A-10 aircraft at Barnes ANGB has been nullified by the recommendations of the Secretary and the BRAC Commission.
- 32. Neither the President nor Congress may remove Otis and Barnes ANGB from the list of recommended closures and realignments unless they reject the BRAC Commission's recommendations in their entirety. Furthermore, it would be historically unprecedented for the President or Congress to reject an entire slate of closure and realignment recommendations.

 Moreover, as described above, the closure and realignment recommendations will become law within 45 legislative days after the President approves them. The President must act by September 23, 2005.
- 33. Absent a temporary restraining order, the harm as alleged herein will be irreparable. The recommendations of the Commission would nullify the power of the Governor to withhold his consent, deprive him of a vital homeland security asset, degrade his ability to defend the security of the citizens of the Commonwealth, and deter enlistments and reenlistments in the Massachusetts Air National Guard.

Absent a temporary restraining order, and after action by the President on or before September 23, 2005, judicial review of the report of the Commission may be contested by the United States under <u>Dalton v. Specter</u>, 511 U.S. 462 (1994).

FIRST CLAIM FOR DECLARATORY RELIEF (MILITIA CLAUSE)

- 34. Plaintiff incorporates by reference and re-allege paragraphs 1 through 33, above.
- 35. Article I, § 8, cl. 16, authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."
 - 36. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 37. Pursuant to Article I, § 8, cl. 16, no base, branch, organization or allotment of a National Guard unit not then in federal service and located entirely within a State may be closed or materially changed by the Secretary or the Commission without the consent of the Governor of that State.
- 38. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated the Militia Clause.

SECOND CLAIM FOR DECLARATORY RELIEF (32 U.S.C. § 104)

- 39. Plaintiff incorporates by reference and re-allege paragraphs 1 through 38, above.
- 40. Title 32 U.S.C. § 104(a) provides that "each State . . . may fix the location of the units and headquarters of its National Guard."
- 41. Title 32 U.S.C. § 104(c) provides that "no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."
 - 42. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.

43. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 32 U.S.C. § 104.

THIRD CLAIM FOR DECLARATORY RELIEF (10 U.S.C. § 18238)

- 44. Plaintiff incorporates by reference and re-allege paragraphs 1 through 43.
- 45. Title 10 U.S.C. § 18238 provides: "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State"
 - 46. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 47. The Commission, in recommending that Otis ANGB be closed and the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 10 U.S.C. § 18238.

PRAYERS FOR RELIEF

WHEREFORE, Governor Romney requests that the Court grant the following relief:

- a. temporarily restrain the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005;
- b. preliminarily enjoin the Commission, Chairman Principi, and the BRAC

Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005;

- c. permanently enjoin the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005.
- d. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated the Militia Clause of the United States Constitution;
- e. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 32 U.S.C. § 104;
- f. declaring that the Commission, in recommending that Otis ANGB be closed,

fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 10 U.S.C. § 18238;

- g. declaring that the challenged portions of the BRAC DoD report are null and void;
- h. declaring that the portion of the BRAC Report that recommends that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, is null and void;
- enjoining the Secretary from taking any action to close Otis ANG, move the
 fifteen F-15 aircraft from Otis ANGB to Barnes ANGB, or move the fifteen A-10
 aircraft at Barnes ANGB to other States; and
- j. awarding such further relief as the Court deems appropriate.

W. MITT ROMNEY GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS

By his attorneys, THOMAS F. REILLY ATTORNEY GENERAL

David R. Kerrigan BBO # 550843
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One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext. 2050, 3380

Dated: September 7, 2005

THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE DEPARTMENT

STATE HOUSE • BOSTON 02133 (617) 725-4000

MITT ROMNEY

KERRY HEALEY

September 1, 2005

The Honorable Donald H. Rumsfeld Secretary of Defense 1000 Defense Pentagon Washington, DC 20310-1000

The Honorable Anthony J. Principi, Chairman Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

Dear Secretary Rumsfeld and Chairman Principi:

I am writing to state that I have not consented to the following:

- (1) The Department of Defense's recommendation to close Otis Air National Guard (ANG) Base and move the 102nd Fighter Wing's aircraft to bases in other states;
- (2) The BRAC Commission's recommendation to move the 102nd Fighter Wing's 18 F-15 aircraft from Otis ANG Base to Barnes ANG Base and close Otis ANG Base; and
- (3) The BRAC Commission's recommendation to move the 104th Fighter Wing's 15 A-10 aircraft from Barnes ANG base to other states.

Because I have not consented to the closure of Otis ANG Base, the reassignment of the 102nd Fighter Wing's aircraft, or the reassignment of the 104th Fighter Wing's aircraft, these recommendations appear to violate 10 U.S.C. Section 18238 and 32 U.S.C. Section 104(c), which require gubernatorial consent for such actions.

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Mitt Romney

Governor

United States District Court

DISTRICT OF Massachusetts

W. Mitt Romney, in his official capacity as Governor of the Commonwealth of Massachusetts

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

Donald H. Rumsfeld, in his official capacity as Secretary of Defense of the United States of America; The Defense Base Closure and Realignment Comm'n; Anthony J. Principi, as Chairman and James H. Bilbray, Philip Coyle, Harol W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd W. Newton, Samuel K. Skinner, and Sue E. Turner as members of the Defense Base Closure and Realignment Comm'n -11821 GAO

TO: (Name and Address of Defendant)

Lloyd W. Newton Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Thomas A. Barnico Assistant Attorney General One Ashburton Place Boston, MA 02108

this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SEP 07 2005

DATE

CLERK

	RETUR	N OF SERVICE		
Service of the Summons and Complaint wa	s made by me ¹	DATE		·
ME OF SERVER (PRINT)		TITLE		
eck one box below to indicate appropriate m	ethod of service			
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Left copies thereof at the defendant's discretion then residing therein. Name of person with whom the summ Returned unexecuted:	nons and complair	nt were left:		
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating vil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

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(c) Attorney's (Firm Name	, Address, and Telephone Number)		Attorneys (If Knowa)			
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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

W. MITT ROMNEY, in his official capacity as Governor of the Commonwealth of Massachusetts,

Plaintiff,

v.

CIVIL ACTION NO. 05-CV-

015 - 11821GAC

DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States of America,

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION,

ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission, and

JAMES H. BILBRAY, PHILIP COYLE, HAROLD W. GEHMAN, JR., JAMES V. VINSON, JAMES T. HILL, LLOYD W. NEWTON, SAMUEL K. SKINNER, and SUE E. TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission,

Defendants.

COMPLAINT

1. This complaint arises from actions of the Department of Defense and the Defense Base Closure and Realignment Commission ("BRAC Commission") recommending the closure of Otis Air National Guard Base in Barnstable, Massachusetts, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without seeking or

obtaining the approval of the Governor of the Commonwealth of Massachusetts. The plaintiff Governor has declined to consent to such closure and movement of aircraft and seeks (1) a temporary restraining order and a preliminary injunction enjoining the defendants, pending a final decision by this Court on all of plaintiff's claims and until further order of the Court, from transmitting a final report to the President of the United States, due on September 8, 2005, pursuant to the Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act"), that includes the recommendation to close Otis Air National Guard Base, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without the consent of the Governor and (2) a declaration that such a report violates the United States Constitution, Article I, § 8, cl. 16, and 32 U.S.C. § 104, and 10 U.S.C. § 18238.

PARTIES

- 2. Plaintiff W. Mitt Romney (the Governor) is the duly elected Governor of the Commonwealth of Massachusetts (the Commonwealth). The Governor is the "commander-in-chief" of the "military forces" of the Commonwealth and has the power under its constitution "to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws."

 Massachusetts Constitution Pt. 2, c. 2, § 1, art. 7. Governor Romney is the commander-in-chief of the Massachusetts National Guard. <u>Id.</u>
- 3. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense (DoD). He is sued in his official capacity.

The BRAC Act sets forth the process by which military bases in the United States and its territories are identified for closure or realignment. Pursuant to the BRAC Act, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the BRAC Commission. He is authorized to oversee, direct, and implement the closure or realignment of military bases pursuant to the BRAC process.

- 4. Anthony J. Principi is the Chairman of the BRAC Commission. He is sued in his official capacity.
- 5. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

JURISDICTION AND VENUE

- 6. This action arises under the Militia Clause of the United States Constitution, art. 1, § 8, cl. 16, and the following federal statutes: 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States.
- 7. This Court has authority to enter a declaratory judgment in this action under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.
- 8. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2) because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of this action is situated within this judicial district.

FACTUAL ALLEGATIONS

The Recommendations of the Secretary

- 9. On May 13, 2005, Secretary Rumsfeld transmitted to the BRAC Commission the Department of Defense Base Closure and Realignment Report ("BRAC DoD Report").
- 10. The BRAC DoD Report was prepared by the Department pursuant to the BRAC Act.
- 11. The BRAC DoD Report contains the Department's recommendations to realign or close military installations within the United States and its territories.
- 12. While preparing its BRAC DoD Report, the Department considered the requirements of installations used by the Air National Guard of the United States.
- 13. The Secretary recommended closure of Otis Air National Guard Base (Otis ANGB) and the distribution of fifteen F-15 Primary Assigned Aircraft (PAA) of the 102d Fighter Wing to Air Guard Stations in Florida and New Jersey.

The BRAC Commission Report and Action by the President and Congress

14. Pursuant to Section 2914(d)(1) of the BRAC Act, the BRAC must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations," to the President by September 8, 2005. <u>Id.</u> The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations in their entirety. <u>Id.</u> § 2914 (e)(1). If the President disapproves the Commission's

recommendations in their entirety, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. Id. § 2914 (e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. Id. § 2914 (e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. Id. § 2903 (e). If Congress does not enact a resolution disapproving the approved recommendations in their entirety within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. Id. § 2904 (a).

- 15. In each of the four previous BRAC processes—occurring in 1988, 1991, 1993, and 1995—the President approved the BRAC Commission's recommendations in their entirety.
- 16. Congress has never disapproved the President's base closure and realignment decisions.
- 17. On August 26, 2005, the BRAC announced that its report to the President will recommend that (1) Otis ANGB be closed, (2) the 102nd Fighter Wing's fifteen F-15 PAA aircraft be moved to Barnes Air National Guard Base in Westfield, Massachusetts; and (3) the 104th Fighter Wing's fifteen A-10 PAA be moved from Barnes ANGB to other States.

Otis and Barnes ANGB

- 18. Otis ANGB is located in Barnstable, Massachusetts, within the Massachusetts Military Reservation and wholly within the Commonwealth.
- 19. Approximately 1000 military positions are currently allotted to the 102d Fighter Wing at Otis NGB. Approximately 1000 military positions are currently allotted to the 104th Fighter Wing as Barnes ANGB. A substantial number of the members of these wings have

combat and homeland defense experience. The 102nd and 104th Fighter Wings constitute a well-trained, mission-ready state military force available to the Governor to perform state activity duty missions dealing with homeland security, natural disasters and other state missions.

- 20. The closure of Otis ANGB and the movement of the fifteen A-10 PAA of the 104th Fighter Wing at Barnes ANGB and related actions will deprive the Governor of a significant amount of the total strength of the Massachusetts Air National Guard and will reduce the strength of Massachusetts military forces.
- 21. These actions will deprive the Governor and the Commonwealth of a key joint base of operations possessing current and future military capabilities for homeland security missions throughout the Northeast United States.
- 22. The 102nd Fighter Wing at Otis ANGB and the 104th Fighter Wing at Barnes ANGB are organized as units of the Massachusetts Air National Guard (state) and Air Combat Command (federal).
- 23. The recommendations of the BRAC Commission regarding Otis and Barnes, if implemented, would constitute a change in the branch, organization or allotment of the units.
- 24. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the BRAC Commission and the BRAC Commission's recommendations regarding Otis ANGB and Barnes ANGB, more than half of the forces there were not and currently are not in active federal service.
- 25. The recommendations of the BRAC Commission regarding Otis ANGB and Barnes ANGB constitute a relocation or withdrawal of a unit of the Air National Guard.
 - 26. At no time during the 2005 BRAC process has Secretary Rumsfeld requested or

obtained the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts Air National Guard at issue.

- 27. At no time during the 2005 BRAC process has any authorized representative of Secretary Rumsfeld, the Department, or the BRAC Commission requested or obtain the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts ANG at issue.
- 28. On September 1, 2005, Governor Romney sent a letter to Secretary Rumsfeld and Chairman Principi stating that he has not consented to the closure of Otis ANGB or the reassignment of the aircraft of the 102nd or 104th Fighter Wings. A copy of Governor Romney's letter is attached to this complaint as Exhibit A.

RIPENESS FOR JUDICIAL REVIEW

- 29. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his obligation to make recommendations with respect to the 2005 round of realignments and closure of military installations. No further action by the Secretary or the Department is required before Otis ANGB is closed and the fifteen A-10 PAA from Barnes ANGB are ordered moved.
- 30. Pursuant to the military base closure and realignment process set forth in the BRAC Act, the BRAC Commission has finally and completely fulfilled its reporting requirements with respect to the 2005 round of realignments and closure of military installations, save for its duty to transmit its report to the President by September 8, 2005. No further action by the BRAC Commission is required before Otis ANGB is closed and the fifteen A-10 PAA

from Barnes ANGB are moved.

IRREPARABLE HARM

- 31. The Governor's right to withhold consent to action to close, relocate, realign, withdraw, deactivate, or change the branch, organization or allotment of Otis ANGB and the 15 A-10 aircraft at Barnes ANGB has been nullified by the recommendations of the Secretary and the BRAC Commission.
- 32. Neither the President nor Congress may remove Otis and Barnes ANGB from the list of recommended closures and realignments unless they reject the BRAC Commission's recommendations in their entirety. Furthermore, it would be historically unprecedented for the President or Congress to reject an entire slate of closure and realignment recommendations.

 Moreover, as described above, the closure and realignment recommendations will become law within 45 legislative days after the President approves them. The President must act by September 23, 2005.
- 33. Absent a temporary restraining order, the harm as alleged herein will be irreparable. The recommendations of the Commission would nullify the power of the Governor to withhold his consent, deprive him of a vital homeland security asset, degrade his ability to defend the security of the citizens of the Commonwealth, and deter enlistments and reenlistments in the Massachusetts Air National Guard.

Absent a temporary restraining order, and after action by the President on or before September 23, 2005, judicial review of the report of the Commission may be contested by the United States under <u>Dalton v. Specter</u>, 511 U.S. 462 (1994).

FIRST CLAIM FOR DECLARATORY RELIEF (MILITIA CLAUSE)

- 34. Plaintiff incorporates by reference and re-allege paragraphs 1 through 33, above.
- 35. Article I, § 8, cl. 16, authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."
 - 36. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 37. Pursuant to Article I, § 8, cl. 16, no base, branch, organization or allotment of a National Guard unit not then in federal service and located entirely within a State may be closed or materially changed by the Secretary or the Commission without the consent of the Governor of that State.
- 38. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated the Militia Clause.

SECOND CLAIM FOR DECLARATORY RELIEF (32 U.S.C. § 104)

- 39. Plaintiff incorporates by reference and re-allege paragraphs 1 through 38, above.
- 40. Title 32 U.S.C. § 104(a) provides that "each State . . . may fix the location of the units and headquarters of its National Guard."
- 41. Title 32 U.S.C. § 104(c) provides that "no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."
 - 42. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.

43. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 32 U.S.C. § 104.

THIRD CLAIM FOR DECLARATORY RELIEF (10 U.S.C. § 18238)

- 44. Plaintiff incorporates by reference and re-allege paragraphs 1 through 43.
- 45. Title 10 U.S.C. § 18238 provides: "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State...."
 - 46. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 47. The Commission, in recommending that Otis ANGB be closed and the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 10 U.S.C. § 18238.

PRAYERS FOR RELIEF

WHEREFORE, Governor Romney requests that the Court grant the following relief:

- a. temporarily restrain the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005;
- b. preliminarily enjoin the Commission, Chairman Principi, and the BRAC

- Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005;
- c. permanently enjoin the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005.
- d. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated the Militia Clause of the United States Constitution;
- e. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 32 U.S.C. § 104;
- f. declaring that the Commission, in recommending that Otis ANGB be closed,

fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 10 U.S.C. § 18238;

- g. declaring that the challenged portions of the BRAC DoD report are null and void;
- h. declaring that the portion of the BRAC Report that recommends that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, is null and void;
- i. enjoining the Secretary from taking any action to close Otis ANG, move the fifteen F-15 aircraft from Otis ANGB to Barnes ANGB, or move the fifteen A-10 aircraft at Barnes ANGB to other States; and
- j. awarding such further relief as the Court deems appropriate.

W. MITT ROMNEY
GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS

By his attorneys, THOMAS F. REILLY ATTORNEY GENERAL

David R. Kerrigan BBO # 550843
Thomas A. Barnico, BBO # 030040
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108

(617) 727-2200, ext. 2050, 3380

Dated: September 7, 2005

THE COMMONWEALTH OF MASSACHUSETTS EXECUTIVE DEPARTMENT

STATE HOUSE * BOSTON 02133 (617) 725-4000

MITT ROMNEY

KERRY HEALEY

September 1, 2005

The Honorable Donald H. Rumsfeld Secretary of Defense 1000 Defense Pentagon Washington, DC 20310-1000

The Honorable Anthony J. Principi, Chairman Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

Dear Secretary Rumsfeld and Chairman Principi:

I am writing to state that I have not consented to the following:

- (1) The Department of Defense's recommendation to close Otis Air National Guard (ANG) Base and move the 102nd Fighter Wing's aircraft to bases in other states;
- (2) The BRAC Commission's recommendation to move the 102nd Fighter Wing's 18 F-15 aircraft from Otis ANG Base to Barnes ANG Base and close Otis ANG Base; and
- (3) The BRAC Commission's recommendation to move the 104th Fighter Wing's 15 A-10 aircraft from Barnes ANG base to other states.

Because I have not consented to the closure of Otis ANG Base, the reassignment of the 102nd Fighter Wing's aircraft, or the reassignment of the 104th Fighter Wing's aircraft, these recommendations appear to violate 10 U.S.C. Section 18238 and 32 U.S.C. Section 104(c), which require gubernatorial consent for such actions.

Sincerely

Mitt Romney

Governor

United States District Court

DISTRICT OF Massachusetts

W. Mitt Romney, in his official capacity as Governor of the Commonwealth of Massachusetts

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

Donald H. Rumsfeld, in his official capacity as Secretary of
Defense of the United States of America; The Defense Base Closure
and Realignment Comm'n; Anthony J. Principi, as Chairman and
James H. Bilbray, Philip Coyle, Harol W. Gehman, Jr., James V.
Vinson, James T. Hill, Lloyd W. Newton, Samuel K. Skinner, and
Sue E. Turner as members of the Defense Base Closure and
Realignment Comm'n

TO: (Name and Address of Defendant)

Anthony J. Principi, Chairman
Base Realignment and Closure Commission
Polk Building, Suite 600
2521 South Clark Street
Arlington, VA 22202

05-11821 GAO

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Thomas A. Barnico Assistant Attorney General One Ashburton Place Boston, MA 02108

an answer to the complaint which is herewith served upon you, within 0 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SAPAH A THORNTON

SEP 07 2005

DATE

CLERK

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating vid docket sheet. (SPE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

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• •	;, Address, and Telephone Number)		Attorneys (If Knowa)					
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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

W. MITT ROMNEY, in his official capacity as Governor of the Commonwealth of Massachusetts,

Plaintiff.

v.

CIVIL ACTION NO. 05-CV-

015 - 11821 GAC

DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States of America,

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION,

ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission, and

JAMES H. BILBRAY, PHILIP COYLE, HAROLD W. GEHMAN, JR., JAMES V. VINSON, JAMES T. HILL, LLOYD W. NEWTON, SAMUEL K. SKINNER, and SUE E. TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission,

Defendants.

COMPLAINT

1. This complaint arises from actions of the Department of Defense and the Defense Base Closure and Realignment Commission ("BRAC Commission") recommending the closure of Otis Air National Guard Base in Barnstable, Massachusetts, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without seeking or

obtaining the approval of the Governor of the Commonwealth of Massachusetts. The plaintiff Governor has declined to consent to such closure and movement of aircraft and seeks (1) a temporary restraining order and a preliminary injunction enjoining the defendants, pending a final decision by this Court on all of plaintiff's claims and until further order of the Court, from transmitting a final report to the President of the United States, due on September 8, 2005, pursuant to the Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act"), that includes the recommendation to close Otis Air National Guard Base, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without the consent of the Governor and (2) a declaration that such a report violates the United States Constitution, Article I, § 8, cl. 16, and 32 U.S.C. § 104, and 10 U.S.C. § 18238.

PARTIES

- 2. Plaintiff W. Mitt Romney (the Governor) is the duly elected Governor of the Commonwealth of Massachusetts (the Commonwealth). The Governor is the "commander-in-chief" of the "military forces" of the Commonwealth and has the power under its constitution "to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws."

 Massachusetts Constitution Pt. 2, c. 2, § 1, art. 7. Governor Romney is the commander-in-chief of the Massachusetts National Guard. Id.
- 3. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense (DoD). He is sued in his official capacity.

The BRAC Act sets forth the process by which military bases in the United States and its territories are identified for closure or realignment. Pursuant to the BRAC Act, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the BRAC Commission. He is authorized to oversee, direct, and implement the closure or realignment of military bases pursuant to the BRAC process.

- 4. Anthony J. Principi is the Chairman of the BRAC Commission. He is sued in his official capacity.
- 5. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

JURISDICTION AND VENUE

- 6. This action arises under the Militia Clause of the United States Constitution, art. 1, § 8, cl. 16, and the following federal statutes: 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States.
- 7. This Court has authority to enter a declaratory judgment in this action under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.
- 8. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2) because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of this action is situated within this judicial district.

FACTUAL ALLEGATIONS

The Recommendations of the Secretary

- 9. On May 13, 2005, Secretary Rumsfeld transmitted to the BRAC Commission the Department of Defense Base Closure and Realignment Report ("BRAC DoD Report").
- 10. The BRAC DoD Report was prepared by the Department pursuant to the BRAC Act.
- 11. The BRAC DoD Report contains the Department's recommendations to realign or close military installations within the United States and its territories.
- 12. While preparing its BRAC DoD Report, the Department considered the requirements of installations used by the Air National Guard of the United States.
- 13. The Secretary recommended closure of Otis Air National Guard Base (Otis ANGB) and the distribution of fifteen F-15 Primary Assigned Aircraft (PAA) of the 102d Fighter Wing to Air Guard Stations in Florida and New Jersey.

The BRAC Commission Report and Action by the President and Congress

14. Pursuant to Section 2914(d)(1) of the BRAC Act, the BRAC must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations," to the President by September 8, 2005. <u>Id.</u> The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations in their entirety. <u>Id.</u> § 2914 (e)(1). If the President disapproves the Commission's

recommendations in their entirety, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. Id. § 2914 (e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. Id. § 2914 (e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. Id. § 2903 (e). If Congress does not enact a resolution disapproving the approved recommendations in their entirety within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. Id. § 2904 (a).

- 15. In each of the four previous BRAC processes—occurring in 1988, 1991, 1993, and 1995—the President approved the BRAC Commission's recommendations in their entirety.
- 16. Congress has never disapproved the President's base closure and realignment decisions.
- 17. On August 26, 2005, the BRAC announced that its report to the President will recommend that (1) Otis ANGB be closed, (2) the 102nd Fighter Wing's fifteen F-15 PAA aircraft be moved to Barnes Air National Guard Base in Westfield, Massachusetts; and (3) the 104th Fighter Wing's fifteen A-10 PAA be moved from Barnes ANGB to other States.

Otis and Barnes ANGB

- 18. Otis ANGB is located in Barnstable, Massachusetts, within the Massachusetts Military Reservation and wholly within the Commonwealth.
- 19. Approximately 1000 military positions are currently allotted to the 102d Fighter Wing at Otis NGB. Approximately 1000 military positions are currently allotted to the 104th Fighter Wing as Barnes ANGB. A substantial number of the members of these wings have

combat and homeland defense experience. The 102nd and 104th Fighter Wings constitute a well-trained, mission-ready state military force available to the Governor to perform state activity duty missions dealing with homeland security, natural disasters and other state missions.

- 20. The closure of Otis ANGB and the movement of the fifteen A-10 PAA of the 104th Fighter Wing at Barnes ANGB and related actions will deprive the Governor of a significant amount of the total strength of the Massachusetts Air National Guard and will reduce the strength of Massachusetts military forces.
- 21. These actions will deprive the Governor and the Commonwealth of a key joint base of operations possessing current and future military capabilities for homeland security missions throughout the Northeast United States.
- 22. The 102nd Fighter Wing at Otis ANGB and the 104th Fighter Wing at Barnes ANGB are organized as units of the Massachusetts Air National Guard (state) and Air Combat Command (federal).
- 23. The recommendations of the BRAC Commission regarding Otis and Barnes, if implemented, would constitute a change in the branch, organization or allotment of the units.
- 24. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the BRAC Commission and the BRAC Commission's recommendations regarding Otis ANGB and Barnes ANGB, more than half of the forces there were not and currently are not in active federal service.
- 25. The recommendations of the BRAC Commission regarding Otis ANGB and Barnes ANGB constitute a relocation or withdrawal of a unit of the Air National Guard.
 - 26. At no time during the 2005 BRAC process has Secretary Rumsfeld requested or

obtained the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts Air National Guard at issue.

- 27. At no time during the 2005 BRAC process has any authorized representative of Secretary Rumsfeld, the Department, or the BRAC Commission requested or obtain the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts ANG at issue.
- 28. On September 1, 2005, Governor Romney sent a letter to Secretary Rumsfeld and Chairman Principi stating that he has not consented to the closure of Otis ANGB or the reassignment of the aircraft of the 102nd or 104th Fighter Wings. A copy of Governor Romney's letter is attached to this complaint as Exhibit A.

RIPENESS FOR JUDICIAL REVIEW

- 29. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his obligation to make recommendations with respect to the 2005 round of realignments and closure of military installations. No further action by the Secretary or the Department is required before Otis ANGB is closed and the fifteen A-10 PAA from Barnes ANGB are ordered moved.
- 30. Pursuant to the military base closure and realignment process set forth in the BRAC Act, the BRAC Commission has finally and completely fulfilled its reporting requirements with respect to the 2005 round of realignments and closure of military installations, save for its duty to transmit its report to the President by September 8, 2005. No further action by the BRAC Commission is required before Otis ANGB is closed and the fifteen A-10 PAA

from Barnes ANGB are moved.

IRREPARABLE HARM

- 31. The Governor's right to withhold consent to action to close, relocate, realign, withdraw, deactivate, or change the branch, organization or allotment of Otis ANGB and the 15 A-10 aircraft at Barnes ANGB has been nullified by the recommendations of the Secretary and the BRAC Commission.
- 32. Neither the President nor Congress may remove Otis and Barnes ANGB from the list of recommended closures and realignments unless they reject the BRAC Commission's recommendations in their entirety. Furthermore, it would be historically unprecedented for the President or Congress to reject an entire slate of closure and realignment recommendations.

 Moreover, as described above, the closure and realignment recommendations will become law within 45 legislative days after the President approves them. The President must act by September 23, 2005.
- 33. Absent a temporary restraining order, the harm as alleged herein will be irreparable. The recommendations of the Commission would nullify the power of the Governor to withhold his consent, deprive him of a vital homeland security asset, degrade his ability to defend the security of the citizens of the Commonwealth, and deter enlistments and reenlistments in the Massachusetts Air National Guard.

Absent a temporary restraining order, and after action by the President on or before September 23, 2005, judicial review of the report of the Commission may be contested by the United States under <u>Dalton v. Specter</u>, 511 U.S. 462 (1994).

FIRST CLAIM FOR DECLARATORY RELIEF (MILITIA CLAUSE)

- 34. Plaintiff incorporates by reference and re-allege paragraphs 1 through 33, above.
- 35. Article I, § 8, cl. 16, authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."
 - 36. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 37. Pursuant to Article I, § 8, cl. 16, no base, branch, organization or allotment of a National Guard unit not then in federal service and located entirely within a State may be closed or materially changed by the Secretary or the Commission without the consent of the Governor of that State.
- 38. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated the Militia Clause.

SECOND CLAIM FOR DECLARATORY RELIEF (32 U.S.C. § 104)

- 39. Plaintiff incorporates by reference and re-allege paragraphs 1 through 38, above.
- 40. Title 32 U.S.C. § 104(a) provides that "each State . . . may fix the location of the units and headquarters of its National Guard."
- 41. Title 32 U.S.C. § 104(c) provides that "no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."
 - 42. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.

43. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 32 U.S.C. § 104.

THIRD CLAIM FOR DECLARATORY RELIEF (10 U.S.C. § 18238)

- 44. Plaintiff incorporates by reference and re-allege paragraphs 1 through 43.
- 45. Title 10 U.S.C. § 18238 provides: "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State"
 - 46. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 47. The Commission, in recommending that Otis ANGB be closed and the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 10 U.S.C. § 18238.

PRAYERS FOR RELIEF

WHEREFORE, Governor Romney requests that the Court grant the following relief:

- a. temporarily restrain the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005;
- b. preliminarily enjoin the Commission, Chairman Principi, and the BRAC

Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005;

- c. permanently enjoin the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005.
- d. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated the Militia Clause of the United States Constitution;
- e. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 32 U.S.C. § 104;
- f. declaring that the Commission, in recommending that Otis ANGB be closed,

fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 10 U.S.C. § 18238;

- g. declaring that the challenged portions of the BRAC DoD report are null and void;
- h. declaring that the portion of the BRAC Report that recommends that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, is null and void;
- enjoining the Secretary from taking any action to close Otis ANG, move the fifteen F-15 aircraft from Otis ANGB to Barnes ANGB, or move the fifteen A-10 aircraft at Barnes ANGB to other States; and
- j. awarding such further relief as the Court deems appropriate.

W. MITT ROMNEY
GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS

By his attorneys, THOMAS F. REILLY ATTORNEY GENERAL

David R. Kerrigan BBO # 550843 Thomas A. Barnico, BBO # 030040 Assistant Attorneys General One Ashburton Place Boston, MA 02108

(617) 727-2200, ext. 2050, 3380

Dated: September 7, 2005



THE COMMONWEALTH OF MASSACHUSETTS EXECUTIVE DEPARTMENT

STATE HOUSE . BOSTON 02133

(617) 725-4000

MITT ROMNEY GOVERNOR

KERRY HEALEY

September 1, 2005

The Honorable Donald H. Rumsfeld Secretary of Defense 1000 Defense Pentagon Washington, DC 20310-1000

The Honorable Anthony J. Principi, Chairman Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

Dear Secretary Rumsfeld and Chairman Principi:

I am writing to state that I have not consented to the following:

- (1) The Department of Defense's recommendation to close Otis Air National Guard (ANG) Base and move the 102nd Fighter Wing's aircraft to bases in other states;
- (2) The BRAC Commission's recommendation to move the 102nd Fighter Wing's 18 F-15 aircraft from Otis ANG Base to Barnes ANG Base and close Otis ANG Base; and
- (3) The BRAC Commission's recommendation to move the 104th Fighter Wing's 15 A-10 aircraft from Barnes ANG base to other states.

Because I have not consented to the closure of Otis ANG Base, the reassignment of the 102nd Fighter Wing's aircraft, or the reassignment of the 104th Fighter Wing's aircraft, these recommendations appear to violate 10 U.S.C. Section 18238 and 32 U.S.C. Section 104(c), which require gubernatorial consent for such actions.

Sincerely

Mitt Romney

Governor



United States District Court

DISTRICT OF Massachusetts

W. Mitt Romney, in his official capacity as Governor of the Commonwealth of Massachusetts

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

Donald H. Rumsfeld, in his official capacity as Secretary of Defense of the United States of America; The Defense Base Closure and Realignment Comm'n; Anthony J. Principi, as Chairman and James H. Bilbray, Philio Coyle, Harol W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd W. Newton, Samuel K. Skinner, and Sue E. Turner as members of the Defense Base Closure and Realignment Comm'n 05-11821 GAO

TO: (Name and Address of Defendant)

Samuel K. Skinner Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Thomas A. Barnico Assistant Attorney General One Ashburton Place Boston, MA 02108

an answer to the complaint which is herewith served upon you, within __(ol)____ this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SEP 07 2005

DATE

AO 440 (Rev. 1/90) Summons in a Civil A

AO 440 (Rev. 1/	90) Summons in a Civil Action			
		RETURN	OF SERVICE	
Servi	ce of the Summons and Complai	int was made by me ¹	DATE	
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating vil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

PLAINTIFFS		1	EFENDANTS		
,		1 (Donald H. Rumsfeld Comm'n, Anthony J W. Gehman, Jr., Jam Ind Sue E. Turner, a	, Secretary of Defense, Defei Principi, Chairman, and Jar nes V. Vinson, James T. Hill, s members of the Defense Ba	nse Base Closure and Realignment mes H. Bilbray, Philip Coyle, Harol Lloyd W. Newton, Samuel K. Skin ase Closure and Realighment Comn
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(E	EXCEPT IN U.S. PLAINTIFF CASES)		NOTE: IN LAN	IN U.S. PLAINTIFF CASES ID CONDEMNATION CASES, U	· ·
				INVOLVED.	SE THE ECCATION OF THE
(c) Attorney's (Firm Name	, Address, and Telephone Number)		Attorneys (If Known)		
Thomas A. Barnico, Assi One Ashburton Place, Bo			nited States Attorite 9200, Boston	rney Michael Sullivan, (ı, MA 02210	One Courthouse Way,
II. BASIS OF JURISE	ICTION (Place an "X" in One Box Only)		ZENSHIP OF P Diversity Cases Only)	PRINCIPAL PARTIES	(Place an "X" in One Box for Plaintiff and One Box for Defendant)
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2 U.S. Government Defendant	Diversity (Indicate Citizenship of Parties in Item III)	Citizen of	Another State	2 1 2 Incorporated and I of Business In a	
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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

W. MITT ROMNEY, in his official capacity as Governor of the Commonwealth of Massachusetts,

Plaintiff,

v.

CIVIL ACTION NO. 05-CV-

DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States of America,

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION,

05-11821GAC

ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission, and

JAMES H. BILBRAY, PHILIP COYLE, HAROLD W. GEHMAN, JR., JAMES V. VINSON, JAMES T. HILL, LLOYD W. NEWTON, SAMUEL K. SKINNER, and SUE E. TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission,

Defendants.

COMPLAINT

1. This complaint arises from actions of the Department of Defense and the Defense Base Closure and Realignment Commission ("BRAC Commission") recommending the closure of Otis Air National Guard Base in Barnstable, Massachusetts, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without seeking or

obtaining the approval of the Governor of the Commonwealth of Massachusetts. The plaintiff Governor has declined to consent to such closure and movement of aircraft and seeks (1) a temporary restraining order and a preliminary injunction enjoining the defendants, pending a final decision by this Court on all of plaintiff's claims and until further order of the Court, from transmitting a final report to the President of the United States, due on September 8, 2005, pursuant to the Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act"), that includes the recommendation to close Otis Air National Guard Base, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without the consent of the Governor and (2) a declaration that such a report violates the United States Constitution, Article I, § 8, cl. 16, and 32 U.S.C. § 104, and 10 U.S.C. § 18238.

PARTIES

- 2. Plaintiff W. Mitt Romney (the Governor) is the duly elected Governor of the Commonwealth of Massachusetts (the Commonwealth). The Governor is the "commander-in-chief" of the "military forces" of the Commonwealth and has the power under its constitution "to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws."

 Massachusetts Constitution Pt. 2, c. 2, § 1, art. 7. Governor Romney is the commander-in-chief of the Massachusetts National Guard. <u>Id.</u>
- 3. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense (DoD). He is sued in his official capacity.

The BRAC Act sets forth the process by which military bases in the United States and its territories are identified for closure or realignment. Pursuant to the BRAC Act, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the BRAC Commission. He is authorized to oversee, direct, and implement the closure or realignment of military bases pursuant to the BRAC process.

- 4. Anthony J. Principi is the Chairman of the BRAC Commission. He is sued in his official capacity.
- 5. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

JURISDICTION AND VENUE

- 6. This action arises under the Militia Clause of the United States Constitution, art. 1, § 8, cl. 16, and the following federal statutes: 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States.
- 7. This Court has authority to enter a declaratory judgment in this action under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.
- 8. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2) because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of this action is situated within this judicial district.

FACTUAL ALLEGATIONS

The Recommendations of the Secretary

- 9. On May 13, 2005, Secretary Rumsfeld transmitted to the BRAC Commission the Department of Defense Base Closure and Realignment Report ("BRAC DoD Report").
- 10. The BRAC DoD Report was prepared by the Department pursuant to the BRAC Act.
- 11. The BRAC DoD Report contains the Department's recommendations to realign or close military installations within the United States and its territories.
- 12. While preparing its BRAC DoD Report, the Department considered the requirements of installations used by the Air National Guard of the United States.
- 13. The Secretary recommended closure of Otis Air National Guard Base (Otis ANGB) and the distribution of fifteen F-15 Primary Assigned Aircraft (PAA) of the 102d Fighter Wing to Air Guard Stations in Florida and New Jersey.

The BRAC Commission Report and Action by the President and Congress

14. Pursuant to Section 2914(d)(1) of the BRAC Act, the BRAC must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations," to the President by September 8, 2005. Id. The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations in their entirety. Id. § 2914 (e)(1). If the President disapproves the Commission's

recommendations in their entirety, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. Id. § 2914 (e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. Id. § 2914 (e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. Id. § 2903 (e). If Congress does not enact a resolution disapproving the approved recommendations in their entirety within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. Id. § 2904 (a).

- 15. In each of the four previous BRAC processes—occurring in 1988, 1991, 1993, and 1995—the President approved the BRAC Commission's recommendations in their entirety.
- 16. Congress has never disapproved the President's base closure and realignment decisions.
- 17. On August 26, 2005, the BRAC announced that its report to the President will recommend that (1) Otis ANGB be closed, (2) the 102nd Fighter Wing's fifteen F-15 PAA aircraft be moved to Barnes Air National Guard Base in Westfield, Massachusetts; and (3) the 104th Fighter Wing's fifteen A-10 PAA be moved from Barnes ANGB to other States.

Otis and Barnes ANGB

- 18. Otis ANGB is located in Barnstable, Massachusetts, within the Massachusetts Military Reservation and wholly within the Commonwealth.
- 19. Approximately 1000 military positions are currently allotted to the 102d Fighter Wing at Otis NGB. Approximately 1000 military positions are currently allotted to the 104th Fighter Wing as Barnes ANGB. A substantial number of the members of these wings have

combat and homeland defense experience. The 102nd and 104th Fighter Wings constitute a well-trained, mission-ready state military force available to the Governor to perform state activity duty missions dealing with homeland security, natural disasters and other state missions.

- 20. The closure of Otis ANGB and the movement of the fifteen A-10 PAA of the 104th Fighter Wing at Barnes ANGB and related actions will deprive the Governor of a significant amount of the total strength of the Massachusetts Air National Guard and will reduce the strength of Massachusetts military forces.
- 21. These actions will deprive the Governor and the Commonwealth of a key joint base of operations possessing current and future military capabilities for homeland security missions throughout the Northeast United States.
- 22. The 102nd Fighter Wing at Otis ANGB and the 104th Fighter Wing at Barnes

 ANGB are organized as units of the Massachusetts Air National Guard (state) and Air Combat

 Command (federal).
- 23. The recommendations of the BRAC Commission regarding Otis and Barnes, if implemented, would constitute a change in the branch, organization or allotment of the units.
- 24. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the BRAC Commission and the BRAC Commission's recommendations regarding Otis ANGB and Barnes ANGB, more than half of the forces there were not and currently are not in active federal service.
- 25. The recommendations of the BRAC Commission regarding Otis ANGB and Barnes ANGB constitute a relocation or withdrawal of a unit of the Air National Guard.
 - 26. At no time during the 2005 BRAC process has Secretary Rumsfeld requested or

obtained the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts Air National Guard at issue.

- 27. At no time during the 2005 BRAC process has any authorized representative of Secretary Rumsfeld, the Department, or the BRAC Commission requested or obtain the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts ANG at issue.
- 28. On September 1, 2005, Governor Romney sent a letter to Secretary Rumsfeld and Chairman Principi stating that he has not consented to the closure of Otis ANGB or the reassignment of the aircraft of the 102nd or 104th Fighter Wings. A copy of Governor Romney's letter is attached to this complaint as Exhibit A.

RIPENESS FOR JUDICIAL REVIEW

- 29. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his obligation to make recommendations with respect to the 2005 round of realignments and closure of military installations. No further action by the Secretary or the Department is required before Otis ANGB is closed and the fifteen A-10 PAA from Barnes ANGB are ordered moved.
- 30. Pursuant to the military base closure and realignment process set forth in the BRAC Act, the BRAC Commission has finally and completely fulfilled its reporting requirements with respect to the 2005 round of realignments and closure of military installations, save for its duty to transmit its report to the President by September 8, 2005. No further action by the BRAC Commission is required before Otis ANGB is closed and the fifteen A-10 PAA

from Barnes ANGB are moved.

IRREPARABLE HARM

- 31. The Governor's right to withhold consent to action to close, relocate, realign, withdraw, deactivate, or change the branch, organization or allotment of Otis ANGB and the 15 A-10 aircraft at Barnes ANGB has been nullified by the recommendations of the Secretary and the BRAC Commission.
- 32. Neither the President nor Congress may remove Otis and Barnes ANGB from the list of recommended closures and realignments unless they reject the BRAC Commission's recommendations in their entirety. Furthermore, it would be historically unprecedented for the President or Congress to reject an entire slate of closure and realignment recommendations.

 Moreover, as described above, the closure and realignment recommendations will become law within 45 legislative days after the President approves them. The President must act by September 23, 2005.
- 33. Absent a temporary restraining order, the harm as alleged herein will be irreparable. The recommendations of the Commission would nullify the power of the Governor to withhold his consent, deprive him of a vital homeland security asset, degrade his ability to defend the security of the citizens of the Commonwealth, and deter enlistments and reenlistments in the Massachusetts Air National Guard.

Absent a temporary restraining order, and after action by the President on or before September 23, 2005, judicial review of the report of the Commission may be contested by the United States under <u>Dalton v. Specter</u>, 511 U.S. 462 (1994).

FIRST CLAIM FOR DECLARATORY RELIEF (MILITIA CLAUSE)

- 34. Plaintiff incorporates by reference and re-allege paragraphs 1 through 33, above.
- 35. Article I, § 8, cl. 16, authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."
 - 36. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 37. Pursuant to Article I, § 8, cl. 16, no base, branch, organization or allotment of a National Guard unit not then in federal service and located entirely within a State may be closed or materially changed by the Secretary or the Commission without the consent of the Governor of that State.
- 38. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated the Militia Clause.

SECOND CLAIM FOR DECLARATORY RELIEF (32 U.S.C. § 104)

- 39. Plaintiff incorporates by reference and re-allege paragraphs 1 through 38, above.
- 40. Title 32 U.S.C. § 104(a) provides that "each State . . . may fix the location of the units and headquarters of its National Guard."
- 41. Title 32 U.S.C. § 104(c) provides that "no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."
 - 42. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.

43. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 32 U.S.C. § 104.

THIRD CLAIM FOR DECLARATORY RELIEF (10 U.S.C. § 18238)

- 44. Plaintiff incorporates by reference and re-allege paragraphs 1 through 43.
- 45. Title 10 U.S.C. § 18238 provides: "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State"
 - 46. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 47. The Commission, in recommending that Otis ANGB be closed and the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 10 U.S.C. § 18238.

PRAYERS FOR RELIEF

WHEREFORE, Governor Romney requests that the Court grant the following relief:

- a. temporarily restrain the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005;
- b. preliminarily enjoin the Commission, Chairman Principi, and the BRAC

Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005;

- c. permanently enjoin the Commission, Chairman Principi, and the BRAC Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005.
- d. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated the Militia Clause of the United States Constitution;
- e. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 32 U.S.C. § 104;
- f. declaring that the Commission, in recommending that Otis ANGB be closed,

fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 10 U.S.C. § 18238;

- declaring that the challenged portions of the BRAC DoD report are null and void; g.
- declaring that the portion of the BRAC Report that recommends that Otis ANGB h. be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, is null and void;
- i. enjoining the Secretary from taking any action to close Otis ANG, move the fifteen F-15 aircraft from Otis ANGB to Barnes ANGB, or move the fifteen A-10 aircraft at Barnes ANGB to other States; and
- awarding such further relief as the Court deems appropriate. j.

W. MITT ROMNEY **GOVERNOR OF THE** COMMONWEALTH OF MASSACHUSETTS

By his attorneys, THOMAS F. REILLY ATTORNEY GENERAL

David R. Kerrigan BBO # 550843 Thomas A. Barnico, BBO # 030040 Assistant Attorneys General One Ashburton Place

Boston, MA 02108

(617) 727-2200, ext. 2050, 3380

Dated: September 7, 2005



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE DEPARTMENT

STATE HOUSE • BOSTON 02133 (617) 725-4000

MITT ROMNEY

KERRY HEALEY

September 1, 2005

The Honorable Donald H. Rumsfeld Secretary of Defense 1000 Defense Pentagon Washington, DC 20310-1000

The Honorable Anthony J. Principi, Chairman Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

Dear Secretary Rumsfeld and Chairman Principi:

I am writing to state that I have not consented to the following:

- (1) The Department of Defense's recommendation to close Otis Air National Guard (ANG) Base and move the 102nd Fighter Wing's aircraft to bases in other states;
- (2) The BRAC Commission's recommendation to move the 102nd Fighter Wing's 18 F-15 aircraft from Otis ANG Base to Barnes ANG Base and close Otis ANG Base; and
- (3) The BRAC Commission's recommendation to move the 104th Fighter Wing's 15 A-10 aircraft from Barnes ANG base to other states.

Because I have not consented to the closure of Otis ANG Base, the reassignment of the 102nd Fighter Wing's aircraft, or the reassignment of the 104th Fighter Wing's aircraft, these recommendations appear to violate 10 U.S.C. Section 18238 and 32 U.S.C. Section 104(c), which require gubernatorial consent for such actions.

Sincerely

Mitt Romney

Governor

United States Bistrict Court

_ DISTRICT OF Massachusetts

W. Mitt Romney, in his official capacity as Governor of the Commonwealth of Massachusetts

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

Donald H. Rumsfeld, in his official capacity as Secretary of Defense of the United States of America; The Defense Base Closure and Realignment Comm'n; Anthony J. Principi, as Chairman and James H. Bilbray, Philip Coyle, Harol W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd W. Newton, Samuel K. Skinner, and Sue E. Turner as members of the Defense Base Closure and 05-11821 GAO Realignment Comm'n

TO: (Name and Address of Defendant)

Sue E. Turner Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Thomas A. Barnico Assistant Attorney General One Ashburton Place Boston, MA 02108

an answer to the complaint which is herewith served upon you, within __(_oO____ _____ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SEP 07 2005

DATE

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating joint docket sheet. (SPE INSTRICTIONS ON THE REVERSE OF THE FORM.)

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(c) Attorney's (Firm Name	, Address, and Telephone Number)							
Thomas A. Barnico, Assi One Ashburton Place, Bo			United States Attor Suite 9200, Boston	rney Michael Sullivan, (ı, MA 02210	One Courthouse Way,			
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VI. CAUSE OF ACTIO	I Driet description of cause: Detendants ac	tions in re	ecommending closure	of Otis Air National Gua	ard Base without obtaining \$ 104 and 10 U.S.C. § 18238			
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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

W. MITT ROMNEY, in his official capacity as Governor of the Commonwealth of Massachusetts,

Plaintiff,

V.

CIVIL ACTION NO. 05-CV-

DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States of America,

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION,

ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission, and

JAMES H. BILBRAY, PHILIP COYLE, HAROLD W. GEHMAN, JR., JAMES V. VINSON, JAMES T. HILL, LLOYD W. NEWTON, SAMUEL K. SKINNER, and SUE E. TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission,

Defendants.

05-11821GAC

COMPLAINT

1. This complaint arises from actions of the Department of Defense and the Defense Base Closure and Realignment Commission ("BRAC Commission") recommending the closure of Otis Air National Guard Base in Barnstable, Massachusetts, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without seeking or

obtaining the approval of the Governor of the Commonwealth of Massachusetts. The plaintiff Governor has declined to consent to such closure and movement of aircraft and seeks (1) a temporary restraining order and a preliminary injunction enjoining the defendants, pending a final decision by this Court on all of plaintiff's claims and until further order of the Court, from transmitting a final report to the President of the United States, due on September 8, 2005, pursuant to the Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act"), that includes the recommendation to close Otis Air National Guard Base, the movement of fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts and the movement of fifteen A-10 aircraft from Barnes ANGB to other States, without the consent of the Governor and (2) a declaration that such a report violates the United States Constitution, Article 1, § 8, cl. 16, and 32 U.S.C. § 104, and 10 U.S.C. § 18238.

PARTIES

- 2. Plaintiff W. Mitt Romney (the Governor) is the duly elected Governor of the Commonwealth of Massachusetts (the Commonwealth). The Governor is the "commander-in-chief" of the "military forces" of the Commonwealth and has the power under its constitution "to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws."

 Massachusetts Constitution Pt. 2, c. 2, § 1, art. 7. Governor Romney is the commander-in-chief of the Massachusetts National Guard. Id.
- 3. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense (DoD). He is sued in his official capacity.

The BRAC Act sets forth the process by which military bases in the United States and its territories are identified for closure or realignment. Pursuant to the BRAC Act, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the BRAC Commission. He is authorized to oversee, direct, and implement the closure or realignment of military bases pursuant to the BRAC process.

- 4. Anthony J. Principi is the Chairman of the BRAC Commission. He is sued in his official capacity.
- 5. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

JURISDICTION AND VENUE

- 6. This action arises under the Militia Clause of the United States Constitution, art. 1, § 8, cl. 16, and the following federal statutes: 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States.
- 7. This Court has authority to enter a declaratory judgment in this action under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.
- 8. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2) because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of this action is situated within this judicial district.

FACTUAL ALLEGATIONS

The Recommendations of the Secretary

- 9. On May 13, 2005, Secretary Rumsfeld transmitted to the BRAC Commission the Department of Defense Base Closure and Realignment Report ("BRAC DoD Report").
- 10. The BRAC DoD Report was prepared by the Department pursuant to the BRAC Act.
- 11. The BRAC DoD Report contains the Department's recommendations to realign or close military installations within the United States and its territories.
- 12. While preparing its BRAC DoD Report, the Department considered the requirements of installations used by the Air National Guard of the United States.
- 13. The Secretary recommended closure of Otis Air National Guard Base (Otis ANGB) and the distribution of fifteen F-15 Primary Assigned Aircraft (PAA) of the 102d Fighter Wing to Air Guard Stations in Florida and New Jersey.

The BRAC Commission Report and Action by the President and Congress

14. Pursuant to Section 2914(d)(1) of the BRAC Act, the BRAC must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations," to the President by September 8, 2005. <u>Id.</u> The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations in their entirety. <u>Id.</u> § 2914 (e)(1). If the President disapproves the Commission's

recommendations in their entirety, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. <u>Id.</u> § 2914 (e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. <u>Id.</u> § 2914 (e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. <u>Id.</u> § 2903 (e). If Congress does not enact a resolution disapproving the approved recommendations in their entirety within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. <u>Id.</u> § 2904 (a).

- 15. In each of the four previous BRAC processes—occurring in 1988, 1991, 1993, and 1995— the President approved the BRAC Commission's recommendations in their entirety.
- 16. Congress has never disapproved the President's base closure and realignment decisions.
- 17. On August 26, 2005, the BRAC announced that its report to the President will recommend that (1) Otis ANGB be closed, (2) the 102nd Fighter Wing's fifteen F-15 PAA aircraft be moved to Barnes Air National Guard Base in Westfield, Massachusetts; and (3) the 104th Fighter Wing's fifteen A-10 PAA be moved from Barnes ANGB to other States.

Otis and Barnes ANGB

- 18. Otis ANGB is located in Barnstable, Massachusetts, within the Massachusetts Military Reservation and wholly within the Commonwealth.
- 19. Approximately 1000 military positions are currently allotted to the 102d Fighter Wing at Otis NGB. Approximately 1000 military positions are currently allotted to the 104th Fighter Wing as Barnes ANGB. A substantial number of the members of these wings have

combat and homeland defense experience. The 102nd and 104th Fighter Wings constitute a well-trained, mission-ready state military force available to the Governor to perform state activity duty missions dealing with homeland security, natural disasters and other state missions.

- 20. The closure of Otis ANGB and the movement of the fifteen A-10 PAA of the 104th Fighter Wing at Barnes ANGB and related actions will deprive the Governor of a significant amount of the total strength of the Massachusetts Air National Guard and will reduce the strength of Massachusetts military forces.
- 21. These actions will deprive the Governor and the Commonwealth of a key joint base of operations possessing current and future military capabilities for homeland security missions throughout the Northeast United States.
- 22. The 102nd Fighter Wing at Otis ANGB and the 104th Fighter Wing at Barnes ANGB are organized as units of the Massachusetts Air National Guard (state) and Air Combat Command (federal).
- 23. The recommendations of the BRAC Commission regarding Otis and Barnes, if implemented, would constitute a change in the branch, organization or allotment of the units.
- 24. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the BRAC Commission and the BRAC Commission's recommendations regarding Otis ANGB and Barnes ANGB, more than half of the forces there were not and currently are not in active federal service.
- 25. The recommendations of the BRAC Commission regarding Otis ANGB and Barnes ANGB constitute a relocation or withdrawal of a unit of the Air National Guard.
 - 26. At no time during the 2005 BRAC process has Secretary Rumsfeld requested or

obtained the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts Air National Guard at issue.

- 27. At no time during the 2005 BRAC process has any authorized representative of Secretary Rumsfeld, the Department, or the BRAC Commission requested or obtain the approval of Governor Romney or his authorized representatives to withdraw or change the branch, organization or allotment of the units of the Massachusetts ANG at issue.
- 28. On September 1, 2005, Governor Romney sent a letter to Secretary Rumsfeld and Chairman Principi stating that he has not consented to the closure of Otis ANGB or the reassignment of the aircraft of the 102nd or 104th Fighter Wings. A copy of Governor Romney's letter is attached to this complaint as Exhibit A.

RIPENESS FOR JUDICIAL REVIEW

- 29. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his obligation to make recommendations with respect to the 2005 round of realignments and closure of military installations. No further action by the Secretary or the Department is required before Otis ANGB is closed and the fifteen A-10 PAA from Barnes ANGB are ordered moved.
- 30. Pursuant to the military base closure and realignment process set forth in the BRAC Act, the BRAC Commission has finally and completely fulfilled its reporting requirements with respect to the 2005 round of realignments and closure of military installations, save for its duty to transmit its report to the President by September 8, 2005. No further action by the BRAC Commission is required before Otis ANGB is closed and the fifteen A-10 PAA

from Barnes ANGB are moved.

IRREPARABLE HARM

- 31. The Governor's right to withhold consent to action to close, relocate, realign, withdraw, deactivate, or change the branch, organization or allotment of Otis ANGB and the 15 A-10 aircraft at Barnes ANGB has been nullified by the recommendations of the Secretary and the BRAC Commission.
- 32. Neither the President nor Congress may remove Otis and Barnes ANGB from the list of recommended closures and realignments unless they reject the BRAC Commission's recommendations in their entirety. Furthermore, it would be historically unprecedented for the President or Congress to reject an entire slate of closure and realignment recommendations.

 Moreover, as described above, the closure and realignment recommendations will become law within 45 legislative days after the President approves them. The President must act by September 23, 2005.
- 33. Absent a temporary restraining order, the harm as alleged herein will be irreparable. The recommendations of the Commission would nullify the power of the Governor to withhold his consent, deprive him of a vital homeland security asset, degrade his ability to defend the security of the citizens of the Commonwealth, and deter enlistments and reenlistments in the Massachusetts Air National Guard.

Absent a temporary restraining order, and after action by the President on or before September 23, 2005, judicial review of the report of the Commission may be contested by the United States under <u>Dalton v. Specter</u>, 511 U.S. 462 (1994).

FIRST CLAIM FOR DECLARATORY RELIEF (MILITIA CLAUSE)

- 34. Plaintiff incorporates by reference and re-allege paragraphs 1 through 33, above.
- 35. Article I, § 8, cl. 16, authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."
 - 36. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 37. Pursuant to Article I, § 8, cl. 16, no base, branch, organization or allotment of a National Guard unit not then in federal service and located entirely within a State may be closed or materially changed by the Secretary or the Commission without the consent of the Governor of that State.
- 38. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated the Militia Clause.

SECOND CLAIM FOR DECLARATORY RELIEF (32 U.S.C. § 104)

- 39. Plaintiff incorporates by reference and re-allege paragraphs 1 through 38, above.
- 40. Title 32 U.S.C. § 104(a) provides that "each State . . . may fix the location of the units and headquarters of its National Guard."
- 41. Title 32 U.S.C. § 104(c) provides that "no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."
 - 42. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.

43. The Commission, in recommending that Otis ANGB be closed and that the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 32 U.S.C. § 104.

THIRD CLAIM FOR DECLARATORY RELIEF (10 U.S.C. § 18238)

- 44. Plaintiff incorporates by reference and re-allege paragraphs 1 through 43.
- 45. Title 10 U.S.C. § 18238 provides: "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State...."
 - 46. The National Guard is the militia reserved to the States by Article I, § 8, cl. 16.
- 47. The Commission, in recommending that Otis ANGB be closed and the PAA at issue at Otis and Barnes ANGB be moved, and the Secretary, in proposing to take action to close Otis ANGB, have violated 10 U.S.C. § 18238.

PRAYERS FOR RELIEF

WHEREFORE, Governor Romney requests that the Court grant the following relief:

- a. temporarily restrain the Commission, Chairman Principi, and the BRAC

 Commissioners from including recommendations to close Otis ANGB, move

 fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in

 Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other

 States in their final report and recommendations to be transmitted to the President
 on or before September 8, 2005;
- b. preliminarily enjoin the Commission, Chairman Principi, and the BRAC

- Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005;
- c. permanently enjoin the Commission, Chairman Principi, and the BRAC Commissioners from including recommendations to close Otis ANGB, move fifteen F-15 aircraft from Otis ANGB to Barnes Air National Guard Base in Westfield, Massachusetts, and move fifteen A-10 aircraft from Barnes to other States in their final report and recommendations to be transmitted to the President on or before September 8, 2005.
- d. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated the Militia Clause of the United States Constitution;
- e. declaring that the Commission, in recommending that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 32 U.S.C. § 104;
- f. declaring that the Commission, in recommending that Otis ANGB be closed,

fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, or otherwise taking action to accomplish these ends without the consent of the Governor, has violated 10 U.S.C. § 18238;

- g. declaring that the challenged portions of the BRAC DoD report are null and void;
- h. declaring that the portion of the BRAC Report that recommends that Otis ANGB be closed, fifteen F-15 aircraft be moved from Otis ANGB to Barnes ANGB, and fifteen A-10 aircraft at Barnes ANGB be moved to other States, is null and void;
- enjoining the Secretary from taking any action to close Otis ANG, move the
 fifteen F-15 aircraft from Otis ANGB to Barnes ANGB, or move the fifteen A-10
 aircraft at Barnes ANGB to other States; and
- j. awarding such further relief as the Court deems appropriate.

W. MITT ROMNEY GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS

By his attorneys, THOMAS F. REILLY ATTORNEY GENERAL

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Dated: September 7, 2005



THE COMMONWEALTH OF MASSACHUSETTS EXECUTIVE DEPARTMENT

STATE HOUSE . BOSTON 02133

(617) 725-4000

MITT ROMNEY GOVERNOR

KERRY HEALEY

September 1, 2005

The Honorable Donald H. Rumsfeld Secretary of Defense 1000 Defense Pentagon Washington, DC 20310-1000

The Honorable Anthony J. Principi, Chairman Base Realignment and Closure Commission Polk Building, Suite 600 2521 South Clark Street Arlington, VA 22202

Dear Secretary Rumsfeld and Chairman Principi:

I am writing to state that I have not consented to the following:

- (1) The Department of Defense's recommendation to close Otis Air National Guard (ANG) Base and move the 102nd Fighter Wing's aircraft to bases in other states;
- (2) The BRAC Commission's recommendation to move the 102nd Fighter Wing's 18 F-15 aircraft from Otis ANG Base to Barnes ANG Base and close Otis ANG Base; and
- (3) The BRAC Commission's recommendation to move the 104th Fighter Wing's 15 A-10 aircraft from Barnes ANG base to other states.

Because I have not consented to the closure of Otis ANG Base, the reassignment of the 102nd Fighter Wing's aircraft, or the reassignment of the 104th Fighter Wing's aircraft, these recommendations appear to violate 10 U.S.C. Section 18238 and 32 U.S.C. Section 104(c), which require gubernatorial consent for such actions.

Sincerely

Mitt Romney

Governor

